File No. 273/28

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Collection No. 1

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Pros. / Serial Nos. 1 — 23

F-7.5

Subject.

Income Tax
References to High Courts

Previous References.	**Later References.**
F-38/18	F 220/29 F. 229 H/31

MGIPC—FP—725DCF—S&P—(G-1576)—14-3-28—60,000.

Postal Address:-
INCOME-TAX BUILDING,
280, DALHOUSIE STREET.

Telegraphic Address:-
"C O M I N T A X."

Telephone:-
COMMISSIONER - 6336 (Govt.)

B U R M A.

No. 233/246 An:50. 26-27.

From

J. C. MACKENZIE, ESQ., I.C.S.

Commissioner of Income-tax, Burma,

To

The Commissioner of Income-tax,

BANGALORE.

Dated Rangoon, the 8th February, 1928.

Subject:- Application to High Court - Section 66 (2) of the Indian Income-tax Act, 1922 - In the matter of Rao Bahadur S.R. Reddiar, Rangoon.

Sir,

I have the honour to forward herewith a copy of the judgment of the High Court of Judicature at Rangoon in the above case.

I have the honour to be,

Sir,

Your most obedient servant,

8.2.28

P.A.

for Commissioner of Income-tax, Burma.

NKR 30/1.

Draft submitted.
(For precedent, vide sl 19.
Issue.
16.2.28

[R. O. 106 (a)].

All communications should be addressed to the Secretary to the Resident in Mysore, Bangalore, by designation and not by name.

OFFICE OF THE RESIDENT IN MYSORE,

Bangalore, 18 Febry 1928

No. 1726 ENCLOS. 1

The accompanying judgment of the Rangoon High Court in C.M.A. No. 71 of 1927

~~A copy of the marginally* noted letter, with enclosure~~, is forwarded

~~*No.~~ ~~dated~~ to the Collector & Assistant Commissioner of Income-tax, C & M station, Bangalore, for reference and favour of return.

~~from the~~

for *Secretary to the Resident.*

532—15-9-1927—5,000—RPB.

CR 16.2.28

No. C.R. 41/28/Cur

Office of the
Collector and Assistant Commissioner of Income-tax,
Civil and Military Station, Bangalore,

Dated the 23rd February *1928*

FROM
T.B.Russell, Esq., I.C.S.,
COLLECTOR AND ASST. COMMR. OF INCOME-TAX,
CIVIL AND MILITARY STATION,
Bangalore.

HEADQUARTER'S OFFICE,
BANGALORE.
Register No. 1769
Date of receipt 24/2/28
38/18

To

The Secretary to the Resident
and Commissioner of Income-tax,
C & M Station, Bangalore.

S. 25 *Subject.*— Reference your memo No.1726/38-1918 dated 18th February 1928.

SIR,

The judgment of the Rangoon High Court in C.M.A.No.71 of 1927 which accompanied the above is returned herewith.

I have the honour to be,
Sir,
Your most obedient servant,

for Collector and Asst. Commr.
of Income-tax.

23/2

23. FEB 1928

Please see ols 24 & 25.

May be filed.

6.3.28 6/3/28.

IN THE HIGH COURT OF JUDICATURE AT RANGCON.

Dated Rangoon, the 3rd day of January 1928.

CIVIL MISCELLANEOUS APPLN. NO. 71 of 1927.

RAO BAHADUR S. RAMANATHA REDDIAR. vs. THE COMMISSIONER OF INCOME-TAX.

For Applicant - Mr. Foucar.

For Respondent - Mr. A. Eggar (G.A.)

JUDGMENT.

This is an application for a rule to obtain a mandamus under Section 66 (3) of the Indian Income-tax Act 1922. In the alternative, by an amendment, the application is made under Section 45 of the Specific Relief Act. The applicant is one Rao Bahadur Ramanatha Reddiar. He seeks to direct the mandamus against the Commissioner of Income-tax, Rangoon, and the Government Advocate appears on the Commissioner's behalf to show cause against the rule.

On the 28th of May 1925, an Order was passed by the Income-tax Officer, Rangoon assessing the applicant for the year 1923-24 on an income of rs 2,16833/-. The applicant appealed from this Order to the Deputy Commissioner of Income-tax, who on the 27th May 1926 rejected the appeal. On rejection, the applicant applied to the Commissioner of Income-tax to refer to this Court six questions of Law alleged to arise out of the Order of the Deputy Commissioner. This application was made under the provisions of Sections 66 (2) of the Income-tax Act aforesaid. The Commissioner, however, in an order dated the 19th of March 1927 rejected the application. He took the view that the six questions of law put forward by the applicant did not arise, as in his opinion the six questions were not questions of law, but were questions of fact. It is with the object of making the

Commissioner alter his opinion in this respect that the present application to obtain a rule is presented.

Section 66 (2) of the Indian Income-tax Act is in these terms:-

"Within one month of the passing of an Order under Section 31 or Section 32, the assessee in respect of whom the Order was passed may, by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such Order, and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court".

Section 66 (3) runs as follows:-

"If, on any application being made under Subsection (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may (within six months from the date on which he is served with the notice of refusal) apply to the High Court, and the High Court if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and to refer it, and on receipt of such requisition, the Commissioner shall state and refer the case accordingly".

The first objection taken by the Crown to the application is that it is out of time. The Order of the Assistant Commissioner made under Section 31 of the Act disposing of the case on appeal is dated the 27th May 1926. The application to refer the points of law was not made until the 3rd of July, 1926.

The first answer to the Crown's objection is that the Commissioner himself waived the irregularity by considering the application and refusing to accede to it. I am of opinion, however, that it is not open to an executive Officer

to waive a provision of a statutory enactment in such a manner

The second answer to the contention is a more substantial one. By an affidavit sworn on the 6th August 1927, (to which there is no answering affidavit), the applicant himself deposes that he did not obtain a copy of the Deputy Commissioner's order dismissing the appeal in time to allow his advisers to formulate the questions of law said to arise. In fact the bare result of the Order was communicated to the applicant on the 1st of June 1926. An application to obtain the reasons supporting the Order was made on the 12th, but the actual Order containing the reasons was not furnished to the applicant until the 26th of June 1926. This is admited by the Crown It seems to me that when the Legislature allowed 30 days to the subject in which to make an appeal, it never intended that the Deputy Commissioner should not communicate his reasons to the assessee at the same time as his bare decision. It is manifestly impossible for any person to make up his mind whether a point of law arises unless he has proper materials to do so, before him. The mere statement that his appeal has been allowed or dismissed is not sufficient. It has often been said that the Revenue Statutes should be construed in favour of the subject. In my view, it is much more important in this connection that any rights of appeal contained in Revenue Legislation be strictly construed as to their exact meaning as far as they allow specific time in which an effective appeal can be put forward. It can easily be seen that a glut of work in the Office of a busy Commissioner might completely deprive an assessee of his right to appeal at all. Such a state of affairs would not be carrying out the intention of the Statute, and in this case, therefore although I think that no conduct of the assessee himself could not have enlarged to his advantage the statutory period under the Section, neither

can any conduct of the executive diminish the full period of time allowed to reflect upon and decide whether action should be taken by way of approach to this Court.

There is a still further contention, however on the part of the Crown which remains to be discussed. The contention is this: that the consideration by the Commissioner of the points of law put up by the applicant was not done at the instance of the applicant at all, but was carried out suo motu under the provisions of section 33 of the Act. It is not difficult to see why this attitude is now adopted, because if action was indeed taken under Section 33, no application could be made to this Court under Section 66 (3). The manner however in which the Commissioner dealt with his Order of the 21st of August, 1926, his heading the Order as an appeal and his recital and discussions of the exact questions proposed to him by the applicant and now before this Court, appear to me to negative the contention that the Commissioner proceeded under Section 33 alone. It seems to me that had the Commissioner taken this view at the time, he must have notified the assessee or his advisers of the special course he was taking and of the Section under which he proposed to proceed.

For these reasons, in the circumstances of the case I am of opinion that the applicant cannot be deprived of his rights of appeal under Section 66 (3) of the Act.

On a perusal of the Order made by the Income-tax Officer; of the Order by the Deputy Commissioner dismissing the appeal; and of the Order made by the Commissioner himself, it is to be noted that there are two main points in dispute between the assessee and the Income-tax Officials. The first point is in relation to the amount to be allowed for repairs to the vessels of the cargo fleet compared with the amount claimed. The second point is in relation to the depreciation of the total value of the fleet,

The attitude taken up by the Income-tax Officer with regard to the claim for the amount expended on repairs, which is put forward by the assessee at the figure of Rs 1,16989/-, was to disallow Rs 58,500/- of the claim under this item. The Income-tax Officer thought that the claim under this heading was exaggerated and in fact untrue. He found definitely that the figure Rs 1,16989/-did not represent current repairs only, but also included replacements on individual vessels, which amounted not to expenditure made for the purpose of carning on the existing vessels , but to a capital expenditure, which the Act under Section 10 does not allow to be deducted for Income-tax purposes. The reason given by the Income-tax Officer for coming to this conclusin is that he was unable to allocate individual items of expenditure on repairs to individual vessels. This was owing to the manner in which the assessee has kept his accounts. The Income-tax Officer's view of the claim in relation to repair expenditure was shared on appeal by the Deputy Commissioner. The Deputy Commissioner also thought that the amount allowed for current repairs as opposed to capital expenditure was, fair and reasonable. He thought that the material by way of accounts which was afforded by the assessee to the Department was slender and unsatisfactory and could give no proper guide to a division between the two forms of capital and current payments. He was of the opinion that the assessee could, if he chose to do so, produce vouchers and pay rolls to support the accounts putforward and to explain them without any ambiguity. When the matter was considered by the Commissioner he took the same view as his two assistants, but perhaps a little more strongly. He was of the opinion that there was a deliberate attempt on the part of the assessee to conceal the nature of the expenditure on his fleet. He found that the expenses for repairs to the shipping for example were delibera-

tely included in the accounts of a saw mill owned by the assessee. The Commissioner sets forth in his Order that the history of the dealing between the Department and the assessee in the past has been far from satisfactory. The Commissioner said that prior to the assessment of 1921-22, although accounts were admittedly in existence none were ever produced. It was not until the assessment of 1921-22 that accounts were put forward. In these accounts in the category of repairs, a large item was included which was subsequently admitted to have been spent on the construction of new vessels. Having regard to this previous history the Commissioner came to the conclusion that where the Income-tax officer is dissatisfied with the materials produced to support a claim, he is entitled to draw the inference that the claim ought to be partly disallowed. Finally the Commissioner asserts that such an inference is an inference of fact alone.

As to depreciation, the attitude taken up by the Income-tax officials (and they all share the same view) is that there were no proper materials before them to deal with the question of depreciation at all. It is contended by the Department that the only basis on which a claim for depreciation can be computed prime cost of the property which is said to have depreciated. It is mentioned in the order of the Deputy Commissioner that the requirements of the Department in respect of depreciation allowance have been frequently and fully explained both to the assessee and to his advisers, in spite of these, no capital accounts, it is said, have ever been put forward in relation to the business and therefore there are no accurate materials upon which the correct capital value of the fleet can be ascertained. Nevertheless what appears to be an Exgratia depreciation allowance of Rs. 15000 was eventually ordered by the Commissioner.

The six alleged questions of law are as follows:-

(a) If in a case where certain sums have been shown as exempted on repairs, is it open to the Income-tax authorities to hold that some part of the said expenditure is capital expenditure

gard to the fact that the business in which the expenditure is incurred is that of a cargo boat-owner and it is not asserted by the Income-tax authorities that any additions or alterations have been made to the cargo boat fleet or that any specific capital expenditure has been made ?

(b) Whether in law a finding that a certain part of admitted expenditure is capital expenditure is maintainable without any finding as to the precise manner in which the said expenditure become capital expenditure ?

(c) Whether in view of the fact that petitioner's business was in existence long prior to the order 1922 when the present Income-tax Act, came into force, it is maintainable that before any allowance for depreciation can be made, it is essential that petitioner should supply particulars of the prime cost of his fleet.

(d) If the assessee is unable to supply full particulars of the prime cost of his fleet, is he to be debarred from claiming any allowance for depreciation on any other basis whatsoever ?

(e) Where, as in the case of the petitioner, the business is an inherited one in what manner is the prime cost of plant, machinery, etc. to be ascertained ?

(f) Whether the petitioner is debarred, under the circumstances of the present case, from maintaining and establishing any claim for depreciation.

Sub-sections (1) and (2) of Section 10 of the Indian Income-tax Act run as follows:-

(1) The tax shall be payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances.

Sub-paragraph (3) of Section 10 referring to allowance is as follows:-

(3) * In reppect of current repairs to such buildings, machinery, plant or furniture, the amount paid on account thereof.*

The vessels of the cargo fleet owned by the present assessee

are qua that part of his business , his plant. They have benn so treated by the Income-tax people.

The question whether a point of law arises on any given finding or whether in reality the alleged point of law is merely a conclusion of fact appears to be a somewhat difficult one depending to a great extend on the particular circumstances of each case. There is no doubt that in the earlier history of the construction of statutes relating to Income-tax a great many questions were considered by the Courts as questions of law which were in reality questions of fact. But when the exact meaning of the various definitive terms contained in the Sections become gradually settled and the principles of taxation well established, we find a much more distinct line drawn between law and fact. The leading cases on the different English Revenue Statutes deal with principles cognate those which govern the Indian legislation and the following pronouncements by English judges appear to me to be particularly cogent to the elucidation of the first broad question. In the case of Smith vs. The Incorporated Council of Law reporting for England and Wales (1), Lord Justice Scrutton (then Mr. Justice Scrutton) dealt with a similar question of principle which arose in condering a case stated by the Commissioners of Income-tax for the division of Lincoln's Inn. The Commissioner had found that a certain gratuity made by the Council of law reporters to one of their reporting staff on his retirement after a long service was allowable to the Council as a business expense in calculating their profits on the year for Income-tax purposes. The Crown appealed arguing that the question whether such a payment could be deducted from the Council's profits as being money wholly and exclusively laid out or expended for the purpose of their business, within the meaning of Schedule D of the English Income-tax Act was a question of Law and not of fact.

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(1) (1914) 3K.B.D. p.674.

Justice Scrutton disagreed with this view and on p.684 says this: "It seems to me that the question whether money is wholly and exclusively laid out or expended for the purposes of trade is a question of fact*. Later on in the judgment the learned Lord Justice went on to say, that in many cases the question whether the money was wholly or exclusively laid out or expended for the purposes of trade must depend upon a knowledge of the facts of the trade, of the way in which it is carried on, and of the effect of payments made in that trade, all of which are questions of fact.

This interpretation was shared by the House of Lords in deciding a very similar question. In a judgment delivered by Lord Sumner in the case of Usher's Wiltshire Brewery vs. Bruce (2) where a finding of the Court of Appeal delivered by Sir Samuel Evans, in which he stated that "when the various circumstances and facts upon which the question depends are established and found, the proper inference in order to determine whether payments were wholly and exclusively laid out for the purposes of the trade or concerned within the meaning of the provisions referred to is a question of law.", was reversed, Lord Sumner said that the judgment appealed against really found facts and did not as Sir Samuel Evans thought it did, rule the law when it declared that the rents foregone were losses of an annual value and not expenses of the trade. Lord Sumner said "Though the answer to the question may itself be an inference from a wide area of facts , it is an answer of fact. There is no suggestion here that the Commissioners found the facts under any mistake in law including in that term the view, conscious or unconscious, that a fact may be found although there is no relevent evidence to support it.".

So too, in the case of Currie vs. The Inland Revenue Commissioners (3), Lord Sterndale decided a question which in my opinion is very similar in principle to the question raised here. In that case the point turned on whether a particular person carried on a profession within exception (C) of Section 39 of the

(2) (1915) Appeal cases p. 433. (3) 1921/K.B.D. p. 332.

..nance Act No.2 of 1915, so as to exempt him from assessment to Excess Profit duties, Lord Sterndale thought that whether a person carries on a profession or whether he he carries on a business or trade was essentially a question of fact to be determined by the special Commissioner of Income-tax alone. Lord Justice Scrutton, who also delivered a judgemnt in the case referred to the decision in Cecil vs. Inland Revenue Commissioners (4) where Mr. Justice Rowlatt had taken the same view in determining the exact status of a photographer. Commenting upon Mr. Justice Rowlatt's Judgemnt and agreeing with it, Lord Justice Scrutton said:" Art is a matter of degree, and to determine whether an artist is a professional man depends in my view on the degree of artistic work that he is doing. All these cases which involve questions of degree seem to me to be eminently questions of fact which the Legislature has thought fit to entrust to the Commissioners who have at any rate from their very varied experience at least as much knowledge if not considerably more, of the various modes of carrying on trade than any judge on the Bench".

Applying then the principles enunciated above I am of opinion that the question whether expenditure in a ship owner's business is current as opposed to capital must essentially be one of degree and therefore one of fact. To elucidate the problem in this particular case there were no doubt in addition to the material provided by the assessee a number of outside considerations which actuated the minds of the officials of the Department, such as their knowledge of the conditions in the port of Rangoon; of the ordinary life of this particular type of wooden cargo boat and of the standard of cost an present owner auch as the applicant might be likely to adopt in keeping his vessels in serviceable condition. A decision on questions of fact however must always be considered by a Appellate Court from the point of view whether although the decision is indubitably one of fact, there was sufficient evidence to come to a proper conclusion. If a decision of fact is founded upon insufficient evidence a question of law is produced which may be considered by any Court of Appeal. In this

(4) 36 Times Law Report p. 164.

particular case there may have been imperfect material on which to found a conclusion , but such lac of evidence and insufficient material was in my opinion, due to the neglect of the assessee and therefore its insufficiency cannot be used to throw over the question of fact a cloak of law. No one can take advantage of his own negligence, otherwise a wilful non-compliance with the Act might place an assessee temporarily at any rate in a most advantageous position. I therefore think that the whole question of the expenditure upoj these cargo vessels is a question of fact to be determined by the Income-tax Officials alone.

On the question of depreciation, I have little difficulty in deciding against the applicant. The exact amount of depreciation of any plant within a given period is also a question of degree and therefore a question of fact, see the Peninsular and Oriental Co. vs. Leslie (5) . Allowances for depreciation are dealt with under Section 10 sub-section (2) sub-paragraph(6) of the Act, but it is a condition precedent to obtain any allowance under this heading that the particulars prescribed by the Act should be furnished by the Income-tax Officer. A form is prescribed which includes capital expenditure and we know from the Order of the Commissioner that no capital accounts have ever been disclosed by the assessee. From the very wording of the proposed questions before the Court the assessee shares this view. Ex Confesso, therefore there was no sufficient material before the Commissioner. It is impossible to decide any question on an allowance of depreciation unless the statement of the prime cost is in the hands of the Income-tax Commissioner. Depreciation allowances are on a percentage basis and therefore the prime cost is essential. I am further of the opinion that it is no part of the duty of the Court to advise the assessee how he ought to keep his accounts or how to satisfy the Income-

(5) (1900) 4 Tax Ases p. 177.

tax Officer over his method of accounting. It is impossible for the purpose to compute any deduction for wear and tear of proper material and therefore the question of this deduction is also in the circumstances I find a question of fact. Nor can I hold that the Income-tax Officials have behaved at all unreasonably in this regard.

For these reasons, I am of opinion that the alleged questions of law are not questions of law but questions of fact for the Commissioner of Income-tax alone. It is therefore not necessary for me to consider any question under Section 45 of the Specific Relief Act. Accordingly the rule will be discharged as not coming within the provisions of Section 66 (3) of the Income-tax Act of 1922.

Costs in favour of the Crown will be allowed at fifteen gold mohurs.

I agree

Sd/- W Carr,

J u d g e.
29-12-27.

Sd/. J.R. Ellis Cunliffe

J u d g e.

Superintendent, copying Dept.,
High Court of Judicature at Rangoon
Examined by me.

PSR/1-2.

4

Postal Address:-
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Telegraphic Address:
"C O M I N T A X."

Telephone:-
COMMISSIONER - 6333 (G

B U R M A.

No. 2092 /Ap:149.
26-27.

From

J. C. MACKENZIE, ESQ., I.C.S.,

Commissioner of Income-tax, Burma,

To

The Commissioner of Income-tax,

B A N G A L O R E.

OFFICE OF THE COMMISSIONER OF INCOME TAX IN MYSORE.
Recd. APR 2 1928
No.
Enclosures, if any.

Dated Rangoon, the 26th March, 1927.

Subject:- Reference to High Court - Section 66(2) of the Indian Income-tax Act, 1922 - In the matter of Messrs. Finlay Fleming & Co., Rangoon.

...DENTO OFFICE...
...LANE...
...No. 3214
...of Receipt 7/4/28

Sir,

I have the honour to forward herewith a copy of the statement in the above case.

I have the honour to be,

Sir,

Your most obedient servant,

26.3.28

P.A.,
for Commissioner of Income-tax, Burma.

PSR/26-3.

Draft subd.
(For precedent, Vide sl 25)

4

INCOME-TAX ACT, INDIAN (XI OF 1922), SECTION 66 (2)— REFERENCE TO THE HIGH COURT. APPLICATION OF MESSRS. FINLAY, FLEMING & CO., RANGOON, FOR A REFERENCE IN CONNECTION WITH ITS ASSESSMENT FOR 1926-27.

STATEMENT OF FACTS AND OF OPINION BY COMMISSIONER OF INCOME-TAX, BURMA.

RANGOON: OFFICE OF THE SUPERINTENDENT GOVERNMENT PRINTING AND STATIONERY, BURMA. MARCH 1928.

SUBJECT :—*Income-tax Act, Indian (XI of 1922), Section 66 (2). Reference to the High Court. Application of Messrs. Finlay, Fleming & Co., Rangoon, for a reference in connection with its assessment for 1926-27.*

* * * * *

This reference is made on the application of Messrs. Finlay, Fleming & Co., Rangoon, under the provisions of Section 66 (2) of the Indian Income-tax Act.

2. The facts of the case are as follows :—

Messrs. Finlay, Fleming & Co., in declaring its income for the year ended 31st December 1925, claimed a deduction of Rs. 1,75,000 representing a loss incurred in an agricultural venture at Hsum Hsai in the Northern Shan States. The Income-tax Officer disallowed the claim on the following two grounds :—

(*a*) that "agricultural income" being excluded from the scope of the Indian Income-tax Act a loss resulting from agricultural operations cannot be set-off against profits from other sources that are assessable under the Act, and

(*b*) that the loss claimed did not arise within the accounting period.

3. On appeal, the Income-tax Officer's decision was upheld by the Deputy Commissioner of Income-tax on the two grounds stated by the Income-tax Officer.

4. On the 18th January 1927, the assessee submitted an application, which is the basis of the present reference, requesting that the following two questions, purporting to be questions of law arising from the appellate order of the Deputy Commissioner, dated the 22nd December 1926, may be referred to the High Court :—

(1) Whether the Assessee, Finlay, Fleming & Co., is entitled to set off the sum of Rs. 1,75,000 representing expenditure on an agricultural experiment at Hsum Hsai against any other income, profits or gains accruing to or received by that firm under any of the heads set out in Section 6 of the Act?

(2) Whether the Assessee, Finlay Fleming & Co., is entitled to claim to set off the loss under Section 24 (1) of the Act notwithstanding the fact that the expenditure was incurred between the years 1920 and 1924 and the amount was written off as a loss in the year 1925 ?

5. The position at the time of presentation of this application was that the first question did not really arise so long as the Income-tax Officer's finding embodied in the second objection stood, *viz.* that the loss claimed did not arise within the accounting period. There was a third question and that was :—

Whether, assuming that a loss on an agricultural operation is an admissible deduction, the loss in question represented expenditure which is recognized for purposes of assessment and deduction under the relevant provisions of the Act [Sections 6, 10 and 24 (1)]?

6, Messrs. Finlay, Fleming & Co. in its application for a reference stated that the whole of the Rs. 1,75,000 in question represented a loss of revenue and not of capital, for admittedly a loss of capital cannot be claimed either as a deduction under Section 10 (2) (ix) or as a loss of profits and gains under Section 24 (1). The Income-tax Officer had not considered this question having rejected the claim on the two grounds stated by him.

7. I remitted the case to the Income-tax Officer for further inquiry under the provisions of Section 33 (2) of the Act and for a specific report on the following points :—

(1) Whether any part of the loss of Rs. 1,75,000 claimed was incurred in the accounting period ?

(2) Whether, as claimed by the assessee, it was impossible to come to a definite decision before 1925 that the venture was a failure and the expenditure, therefore, a loss ?

(3) Whether, apart from the sum of Rs. 1,75,000 in question, there was other similar expenditure that fell within the accounting period ?

8. The Income-tax Officer has reported as follows :—

(1) that, out of the sum of Rs. 1,75,000, only Rs. 9,387 represented expenditure incurred in the accounting year ended 31st December 1925 ;

(2) that it was abundantly clear before 1925 that the venture was a failure and the expenditure, therefore, unproductive ; and

(3) that other similar expenditure amounting to Rs. 17,732 was incurred in the same accounting year.

The Income-tax Officer also noted that the sum of Rs. 1,75,000 represented wholly expenditure of a capital nature.

9. On the view embodied in the Income-tax Officer's report that the whole of the sum of Rs. 1,75,000 represents capital expenditure, the questions put do not arise ; but, as this point was not dealt with by the Income-tax Officer in his assessment order, nor by the Deputy Commissioner of Income-tax in his appellate order, I propose to leave it open for further consideration and decision should the occasion arise as a result of this reference. It is clear, however, that the questions cannot be referred in the terms formulated, for they are not in accordance with the facts of the assessment. It is, therefore, necessary to reconstruct them as follows :—

(1) Whether under the provisions of the Indian Income-tax Act a loss of profits or gains on an agricultural venture can be set-off against income, profits or gains under any of the heads in Section 6 of the Act ?

(2) Whether the loss in question can be set-off notwithstanding the fact that the expenditure resulting in the loss was incurred in a period prior to the accounting year in respect of which the assessment is made ?

10. As regards the first question, I will first set out the relevant provisions of the Act.

Section 4 (3) of the Act states that the Act shall not apply to certain classes of income, of which "agricultural income" is one.

Section 6 *enacts* :

"Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely :—
* * * (iv) Business * * *."

Section 10 (1) *enacts* :

"The tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him."

While Section 10 (2) prescribes the method of computation of such profits or gains.

Section 24 (1) *enacts* :

"Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in Section 6, he shall be entitled to have the amount of the loss set-off against his income, profits or gains under any other head in that year."

The assessee's contention is that "agriculture" is "business" and that, although agricultural income does not come within the scope of the Act for the purpose of assessment to income-tax, a loss on an agricultural operation must be regarded as a loss on business, and as such it comes within the scope of Section 24 (1) read with Section 6.

11. The answer to these contentions appears to me to be obvious and simple.

In the first place, Section 24 (1) could not possibly apply to a case like the present, because it refers to setting off loss under one of the heads in Section 6 against loss under another head in that section. Here the assessable income is derived from "business," and it is contended that "agriculture" is also "business". What is claimed is to set off loss under "business" against profits and gains of "business". Such a claim, whatever its merits on other grounds, cannot be brought under Section 24(1).

12. In the second place, a reference to Section 6 will show that it classifies under certain heads—one of which is "business"—"income, profits and gains chargeable to income-tax". That is its sole function. 'Agricultural income' which is not chargeable to tax (Section 4 (3) (viii)) cannot fall under the head

'business' in Sections 6 and 10, nor can it be included in the expression "income, profits or gains under any other head" in Section 24(1) where "the heads mentioned in Section 6" are specifically referred to.

To conclude otherwise would be to conclude that income from agriculture was chargeable to tax and render the Act self-contradictory.

13. In the third place, the Income-tax Act, except in Section 24, which as I have just shewn, is inapplicable to the present case, says nothing about "losses". It provides for the taxation of income, profits or gains. This means, of course, a *balance* of income, etc., and the Act shows how this balance is to be computed. In computing the profits or gains of "business" it provides in Section 10, sub-section (2) that various allowances or deductions from the gross income shall be made. No other deductions from the gross income are permissible.

14. Clauses (i) to (viii) of the sub-section relate to specific classes of expenditure and need not be considered. Clause (ix) refers to "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning *such profits or gains*". The words in italics refer back to the words "the profits or gains of any business carried on by him" in Section 10, sub-section (1) and the same sub-section shows that the profits or gains in question are profits or gains that are *taxable*. It is perfectly clear therefore that no expenditure whether it be a "loss" or not (and all expenditure as such is technically a "loss") can be deducted from the taxable profits or gains of "business," except expenditure incurred to earn these taxable profits. The profits of agriculture are not taxable.

15. I may add that if in the present case in which the expenditure in question proved a "loss" in the popular sense, it were permissible to deduct it from the taxable profits, I can see no reason why it should not be equally permissible to deduct it even if it had resulted in a profit, though the profit itself would not be taxable which is evidently a *reductio ad absurdum*.

16. As for the second question, it does not arise in view of my answer to the first question.

If certain expenditure is in any circumstances an inadmissible deduction from the taxable profits, the year in which it was incurred is evidently immaterial.

17. The reply to the more general question, whether expenditure otherwise admitted can be allowed as a deduction if it was not incurred in the year in which the taxable income was earned, is that, so far as departmental practice is concerned, at all events, there is no hard-and-fast rule on the subject. We are content to accept ordinary business methods. Expenditure incurred in connection with business, the profits of which fall within the scope of the Act, is of course ordinarily entered in the accounts when it is incurred. If there is delay in making the entry, a reasonable explanation of the delay would be accepted. In any case there is no question of waiting to see whether particular expenditure results in profit or loss before charging it.

18. To summarise, it is difficult to discuss questions that are so entirely misconceived, but I have endeavoured to do so. My answer to both questions is in the negative—while in regard to the second question I would add that the period when the "loss" was incurred is immaterial.

J. C. MACKENZIE,

Dated Rangoon, the 20th March 1928.

Commissioner of Income-tax, Burma.

G.B.C.P.O.—No. 1, Comr. of I.-Tax, 21-3-1928—50.

[R. O. 106 (a)].

All communications should be addressed to the Secretary to the Resident in Mysore, Bangalore, by designation and not by name.

OFFICE OF THE RESIDENT IN MYSORE,

Bangalore, 16th April 1928

No. 3754 ENCLOS.

× encl. 6 P.C.

~~A copy of~~ The marginally* noted ×paper ~~letter, with enclosure~~, is forwarded

No. dated

Statement in ~~from the~~ the case referred to the Rangoon High Court in the matter of Messrs. Friday Fleming & Co. Rangoon

to the Collector & A. C. of I. T., C. & M. Stn. B'lore, for reference & favour of return

Sd/ K. Evans Gordon

Secretary to the Resident.

532—15-9-1927—5,000—RPB.

7/16/4/28

CNR 15.4.28

CNR 15/4/28

Postal Address:-
INCOME-TAX BUILDING,
280, DALHOUSIE STREET.
legraphic Address:-
"C O M I N T A X."
Telephone - (6333 GOVT.
(888 CENT.

BURMA

No. 5719 / Ap.205 27-28

6

From

J. C. MACKENZIE, ESQ., I.C.S.,

Commissioner of Income-tax, Burma

To

The Commissioner of Income-tax,

BANGALORE.

Dated Rangoon, the 22nd May 1928.

Subject:- Reference to High Court, Section 66(2) of the Indian Income-tax Act (XI of 1922) - In the matter of Mr. Phra Phraison Salarak, Siamese Agent, Moulmein.

* * *

Sir,

I have the honour to forward herewith a copy of the statement in the above case.

I have the honour to be,

Sir,

Your most obedient servant,

21-5-28

P.A.,
for Commissioner of Income-tax, Burma.

Draft submitted.
For precedent, vide-SI 28

CHN/21-5.

INCOME-TAX ACT, INDIAN (XI OF 1922), SECTION 66 (2)— REFERENCE TO THE HIGH COURT. APPLICATION OF MR. PHRA PHRAISON SALARAK, SAIMESE AGENT, MOULMEIN, FOR A REFERENCE IN CONNECTION WITH HIS ASSESSMENT FOR 1927-28.

RANGOON : OFFICE OF THE SUPERINTENDENT, GOVERNMENT PRINTING AND STATIONERY, BURMA. MAY 1928.

INCOME TAX OFFICER
6- JUN 1928
C. & M. STATION BANGALORE

SUBJECT.—*Indian Income-tax Act (XI of 1922)—Section 66 (2)—Application of Mr. Phra Phraison Salarak, Siamese Agent, Moulmein, for a reference to the High Court in connection with his assessment for 1927-28.*

* * * * *

This reference is made under the provisions of section 66 (2) of the Indian income-tax Act, 1922, on the application of Mr. Phra Phraison Salarak of Moulmein in connection with his assessment to income-tax for the year 1927-28. The questions which I have been asked to refer to the High Court and which are set out in the following paragraph arise from the appellate order, dated the 18th November 1927, of the Assistant Commissioner of Income-tax for the Amherst District in which the assessment in question was confirmed.

2. The facts of the case are as follows :—

Mr. Phra Phraison Salarak is a Forest Officer in the service of the Siamese Government. He resides and functions at Moulmein in British territory. His work consists in collecting at Moulmein royalties on timber extracted from forests in Siamese territory. The cut timber is transported by streams, the earlier part of whose courses is in Siamese territory and the lower part in Burma. The logs are collected near Moulmein and by a private arrangement the firms pay in Moulmein the royalty due to the Siamese Government. Mr. Phra Phraison Salarak, the officer who collects the dues on behalf of the Siamese Government, received during the previous year a total salary of Rs. 8,754 being at the rate of 600 ticals per mensem. This amount was paid to the credit of the applicant in Bangkok. Of the total amount a sum of Rs. 8,267 was remitted to British India. The Income-tax Officer, Moulmein, determined for the purposes of the assessment to income-tax for 1927-28 the total income of the previous year as Rs. 9,234, *i.e.*, the total amount of the applicant's salary for the year Rs. 8,754 *plus* Rs. 480 the value of the rent-free quarters enjoyed by him. The amount was assessed under the head "Salaries." The applicant appealed against the assessment on two grounds material to the present application. He denied that the salary paid to him was "Salary" for the purposes of Section 7 of the Indian Income-tax Act, 1922. His second ground was that the salary was not liable to assessment as it did not arise or accure in British India. The Assistant Commissioner decided the appeal against the applicant on both points, whereon the applicant made the present application to me.

3. The two questions which I was asked to refer are as follows :—

(1) That the income is not salary within the meaning of Section 7 (1) of the Act, since the Siamese Government cannot be regarded as the "Government" or as a public body or association or a private employer.

(2) That, in any case, whatever may be the classification of the income, for the purpose of section 6, such income cannot be said to "accrue or arise in British India" within the meaning of section 4 of the Act.

4. As regards the first question, the assessee's contention is, in my opinion, correct. A foreign Government is clearly not one of the classes of employers specified in section 7 (1) of the Act. Therefore, I do not think that the remuneration in question can be classified as "Salaries." This question was therefore decided in the applicant's favour and does not form part of the present reference.

5. As regards the second question, the position is this. Mr. Phra Phraison Salarak resides and works in British India. For the work performed in British India he receives a certain remuneration. It is immaterial for the purpose of

taxation whether or not this sum is drawn by him in British India. Section 4 (1) of the Income-tax Act makes liable to Indian income-tax *inter alia* all income, profits and gains accruing or arising in British India. To be liable to tax, therefore, it must be shown that the income in question accrued or arose in British India. There is no definition of the terms "accrue" and "arise" in the Indian Income-tax Act. But surely the plain meaning of the words "accrue and arise" as applied to a salary-earner appears to be that the salary accrues and arises in the place where he does the work.

Furthermore the meaning of the terms has been discussed in different connections in the Indian cases cited in the margin. A study of these judgments will show that the generally accepted interpretation of the terms in question is to make them equivalent to "earned in" or "derived from" British India. The income in question is clearly earned by the assessee in British India where he works and resides. It therefore accrues in British India and is taxable.

(1) I.L.R. (1919) 43 Madras 75; reproduced in Income-tax Cases, P. R. Srinivasan, Volume I, page 37.
(2) I.L.R. (1921) 45 Bombay 1286; reproduced in Income-tax Cases, P. R. Srinivasan, Volume I, page 116.
(3) I.L.R. (1923) 46 Madras 706; reproduced in Income-tax Cases, P. R. Srinivasan, Volume I, page 202.
(4) I.L.R. (1925) 52 Calcutta 1; reproduced in Income-tax Cases, P. R. Srinivasan, Volume I, page 363.

The Judicial Committee of the Privy Council in the Australian case *Commissioners of Taxation v. Kirk* held that as regards business the profits from any profit-earning operations accrued in the place in which these operations were carried on, although sales took place and the profits were actually received elsewhere. In conformity with this ruling salary would accrue in the place in which the services in consideration for which the salary was paid were performed, irrespective of the place where the salary is paid. In the present instance, the services were performed entirely within British India.

(1900) A.C. 588.

As regards the intention of the legislature to tax "Salaries" (in the unrestricted sense of the term) earned in British India but paid out of India, section 18 (2A) inserted by clause 2 of Act XVI of 1925 removes all doubt in the matter. This provision was inserted to legalise deduction at source of income-tax payable on Sterling Overseas pay drawn by Government officers in the United Kingdom. In providing for deduction at source the legislature clearly assumed the income to be liable to tax under section 4 (1) of the Act.

Accordingly the answer to the question should, in my opinion, be that the income in question is income accruing or arising in British India and therefore taxable.

As regards classification, it comes under the head "Other sources" [section 6 (vi) read with section 12].

J. C. MACKENZIE,
Commissioner of Income-tax, Burma.

Dated Rangoon, the 7th May 1928.

B.C.P.O.—No. 1, C.I.Tax, 14-5-1928—50.

[R. O. 106 (a)].

All communications should be addressed to the Secretary to the Resident in Mysore, Bangalore, by designation and not by name.

OFFICE OF THE RESIDENT IN MYSORE,

Bangalore, 5 June 1928

No. 5334 ENCLOS. /

~~A copy of~~ the marginally* noted paper ~~letter, with enclosure~~, is forwarded

~~*No. dated~~ Reference to High Court, under sec. 66 (2) of the Income-tax Act in the matter of Mr. Phra Phraisan Salarak, Moulmein ~~from the~~

to the Collector of A.C. of Income-Tax, Commrs., Bangalore, for reference & favour of return

Secretary to the Resident.

532—15-9-1927—5,000—RPB.

C VP 1.6.28

No. Mis/Ests

Office of the
Collector and Assistant Commissioner of Income-tax,
Civil and Military Station, Bangalore,

Dated the 29th May 1928.

FROM
T. B. Russell, Esq., I.C.S.,
COLLECTOR AND ASST. COMMR. OF INCOME-TAX,
CIVIL AND MILITARY STATION,
Bangalore.

To

The Secretary to the Resident
and Commissioner of Income-tax,
Civil & Military Station, Bangalore.

PRESIDENT'S OFFICE,
BANGALORE.
Diary No. 4852
Date of Receipt 2/6/1928
File No. 3878

Subject.—

SIR,

I have the honour to return herewith the Statement forwarded with your endorsement No.3754/38-1918 dated the 16th April 1928.

I have the honour to be,
Sir,
Your most obedient servant,

D.Y. Bonjour 31.5.28.

KMP. For Collector and Asst.Commr. of I.T.

31.5.

1 MAY 1928

May be filed

6.6.28

Postal Address:-
INCOME-TAX BUILDING,
230, DALHOUSIE STREET.
Telegraphic Address:-
" C.O.M I N T A X. "
Telephone - 6333 GOVT.
888 CENT.

BURMA.

9

No. 6140 / Ac. 115 / 27-28

From

J. C. MACKENZIE, ESQ., I.C.S.,

Commissioner of Income-tax, Burma,

OFFICE OF THE COMMISSIONER OF INCOME TAX IN MYSORE.
Recd. JUN 6 1928
No.
Enclosures, if any.

To

The Commissioner of Income-tax,

BANGALORE.

Dated Rangoon, the 29 May 1928.

Subject: Civil Miscellaneous Application No. 22 of 1928 - Application under Section 66(3) of the Indian Income-tax Act - A.K.A.C.T.V. Chettyar Firm Vs. Commissioner of Income-tax, Burma.

***

Sir,

I have the honour to forward herewith a copy of the Judgment of the High Court at Rangoon in the above case.

I have the honour to be,

Sir,

Your most obedient servant,

for Commissioner of Income-tax, Burma.

PKR/28-5.

Draft in

C.V. Ramanathayyar
12-6-28

dent
V.30

IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Dated Rangoon, the 30th day of April, 1928.

Civil Miscellaneous Application No. 22 of 1928.

A.K.A.C.T.V. CHETTYAR FIRM Vs. THE COMMISSIONER OF INCOME-TAX.

Application for a mandamus under Section 66 (3) of the Indian Income-Tax Act, 1922.

For Applicant: Mr. Venkatram.

For Respondent: ~~Mr. A. Eggar, G.A.~~

JUDGMENT.

This is an application on the part of the A.K.A.C.T.V. Chettyar firm of Wakema. It is made under Section 66 sub-section (3) of the Indian Income-tax Act. The application seeks for a mandamus against the Commissioner of Income-tax requiring him to state a case on two points of law. The points of law are alleged to arise out of an assessment of the firm to Income-tax, but whatever merits they may have, it is our opinion that we cannot consider them, for this very simple reason, that when the Commissioner was approached on the 13th of August 1927, he was asked to state a case based upon four (as far as we can see) quite different points of law. Two of these points have been jettisoned and for the two remaining points, the points before us have been substituted. It appears to us that the intention of the language of sub-section (3) of section 66 is perfectly clear. Sub-section (3) runs as follows:-

> "If, on any application being made under sub-section (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may, within six months from the date on which he is served with notice of the refusal, apply to the High Court and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and to refer it, and on receipt of such requisition, the Commissioner shall state and refer the case accordingly."

It appears to us quite obvious that what is meant by the language of the section is that the Commissioner shall be required to state a case upon the points of law, or at any rate, one of the points of law which he was considering. If the assessee were permitted to shift his ground from a legal point of view without any check upon him, it appears to us that the whole of the consideration by the Commissioner before any application reaches this Court would be rendered abortive.

In these circumstances and on this preliminary point, this application must be dismissed, with costs five gold mohurs in favour of the Crown.

Sd/- J. M. Baguley,
Judge.

Sd/- J. R. Ellis Cunliffe,
Judge.

INCOM TAX OFFICER C. & M. ST T
15 JUN 1928

* * * *

TRUE COPY.

28/5/28

Clerk,
Office of the Commissioner of Income-tax, Burma.

TKR/28-5.

10

[R. O. 106 (a)].

All communications should be addressed to the Secretary to the Resident in Mysore, Bangalore, by designation and not by name.

OFFICE OF THE RESIDENT IN MYSORE,

Bangalore, 14th June 1928

No. 5670 ENCLOS. 1

~~A copy of~~ the marginally* noted paper ~~letter, with enclosure,~~ is forwarded

*~~No.~~ ~~dated~~ from ~~the~~ Judgment of The Rangoon High Court in C.M.A No. 22 of 1928

to the Collector & Asstt. Comm of Income-tax, Coimbatore, Bangalore, for reference & favour of return.

for *Secretary to the Resident.*
Comm^r of Income tax

532—15-9-1927—5,000—RPB.

12.6.28

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280, DALHOUSIE STREET.

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Telephone - 6333 GOVT.
888 CENT.

B U R M A.

No. 10767/

Ap:205
27-28.

From

J. C. MACKENZIE, ESQ., I.C.S.,

Commissioner of Income-tax, Burma,

To

The Commissioner of Income-tax,

BANGALORE.

PRESIDENT'S OFFICE,
BANGALORE.
Register No. 7784
Date of Receipt 31/8/28
File No.

(R) S.N.6

Dated Rangoon, the 27th July 1928.

Subject:-

Reference to High Court - Section 66 (2) of the Indian Income-tax Act (XI of 1922) - In the matter of Mr. Phra Phraison Salarak, Siamese Agent, Moulmein - My letter No. 5706/Ap:205, dated the 22nd May 1928. 5719 27-28

Sir,

In continuation of my letter cited above, I have the honour to forward herewith a copy of the judgments in the above case.

I have the honour to be,

Sir,

Your most obedient servant,

27.7.28

for Commissioner of Income-tax, Burma.

P.A.

27/7/28

(T)x Draft submitted. (For precedent, vide S.N. 10)

C.V Ramanathan.
13.8.28

MKR 26/7.

IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Dated Rangoon, the 20th day of June 1928.

Civil Reference No.2 of 1928.

In re-
The Commissioner of Income-tax. vs. Mr. Phra Phraison Salarak.

For applicant - Eggar, Government Advocate.

For respondent - Daniel.

JUDGMENT.

This is a reference under section 66(2) of the Indian Income-tax Act, 1922, on the application of one Phra Phraison Salarak, a forest officer in the service of the Siamese Government, stationed at Moulmein, where he collects the royalty on timber, extracted from forests in Siamese territory, whence it is floated down streams, the earlier of whose courses is in that territory. For his services he receives remuneration which is paid to his credit in Bangkok. He was assessed to income-tax under the head of "salary" for the year 1927-28 in respect of the total amount so paid to his credit and of the value of the rent free quarters enjoyed by him. He appealed against the assessment om the grounds, first, that the salary paid to him was not "salary" for the purposes of section 7 of the Act, and, secondly, that it was not liable to assessment as it did not arise or accrue in British India. The Assistant Commissioner decided the appeal against him on both points, whereupon he asked the Commissioner to refer to the Court the following questions:-

(1) That the income is not salary within the meaning of section 7(1) of the Act, since the Siamese Government cannot be regarded as the "Government or as a public body or association or a private employer."

(2) That, in any case, whatever may be the classification of the income for the purposes of section 6, such income cannot be said to "accrue or arise in British India" within the meaning of section 4 of the Act.

The Commissioner was of the opinion that the remuneration of the applicant could not be classified as "salaries", and, therefore, referred only the second question.

By section 4 (1), save as thereinafter provided, the Act is to apply to all income profits or gains, as described or comprised in section 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of the Act to accrue, arise, or to be received in British India. Under section 6, save as otherwise provided by the Act, six heads of income, profits and gains are to be chargeable to income-tax. The first of these heads is "salaries" and the sixth is "other sources". The Commissioner, having held that the remuneration in question cannot be classified under the first head, classified it under the sixth head.

The question is as to whether the remuneration "accrues, or arises" in British India. The Commissioner is of the opinion that the remuneration accrues or arises in the place where the work is done in respect of which the remuneration is given, and that, consequently, the work having been done in British India, the remuneration is attracted by section 6. The Government Advocate has supported this view. The expression is not defined in the Act, and no authority directly bearing on the point now to be decided has been qupted. Reference, however, has been made to a number of authorities where the expression has been discussed, and it is suggested that as a result it should be be interpreted as meaning "earned in" or "derived from".

In Board of Revenue Madras v Ramanadhan Chetty (1) it was held under section 3(1) of the Act of 1918, the wording of which is similar to that of section 4 (1) of the present Act, that a resident in British India is not liable to tax in respect of the income of a business carried on outside British India, where such income is not remitted to British India. The case itself is not in point, and the only passages in the report to which the Government Advocate has directed attention are a discussion by Abdur Rahim, Offg. C.J. (on page 82) on a possible difference between the phrases "accrues and arises" and "accrues or arises", and quotations by Oldfield J (on pages 84 and 85) from dictionaries as to

the meaning of the word "accrue". From these it appears that the primary meanings are "to arise or spring as a natural growth or result", "to come by way of increase" and "to grow or arise" while as secondary meanings it has "to become a present and enforceable right", and "to become a present right of demand"

Seshagiri Ayyar J (at pages 90 & 91) quotes some further definitions. In Murray's Oxford Dictionary the words "accrues" and "arises" are regarded as synonymous. In the Century Dictionary the word "accrue" is defined to mean "to become a present or enforceable right to demand". Stroud defines "arising in the United Kingdom" as "coming into the person's hands in the in the United Kingdom".

In Re Rogers Pyatt Shellac & Company v. Secretary of State (2), Mukerji J after discussing theoretical distinctions between "accruing" and "arising" arrives at the conclusion that the words denote the same idea, or ideas very similar, and that both words are used in contradistinction to the word "receive" and indicate a right to receive. They represent, he says, a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate. These definitions do not support the view that income accrues or arises in a particular country by reason of the fact that it is "earned" in that country. On the contrary they go to show that income "accrues" and arises" in the country where there is a right to demand payment of it, or where, in fact, it is paid. In the case referred the applicant is a Siamese Government servant and there is nothing to indicate that he has a right to demand payment of his income in Moulmein, and, according to the case, it is actually paid in Bangkok.

Commissioners of Taxation v Kirk (3) was a decision of the Privy Council on a New South Wales Act which imposed income tax on incomes inter alia (1) "accruing or arising to any person wheresoever residing from any profession trade employment or vocation carried on in New South Wales", (3) "derived from lands

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(1) (1919) I.L.R.43 Mad.75. (2) I.L.R.52 Cal., at p.30

of the Crown held under lease or license issued by or on behalf of the Crown" and (4) "arising or accruing to any person whresoever residing from any kind of property" (with an immaterial exception) "or from any other source whatsoever in New South Wales not included in the preceeding sub-sections". A company in part derived its income from the extraction of ore from leasehold lands held from the Crown in that Colony and from the conversion in that Colony of the crude ore into a merchantable product. It was held that, notwithstanding that the finished products were sold exclusively outside the Colony, this income was assessable. Their Lordships said that the real question seemed to be whether any part of the profits of the company were earned or produced in the Colony. And, later in the judgment after pointing out that the word "derived" is synonymous with arising or accruing, they went on to observe that "there are four processes in the earning or production of this income - (1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages. The first process seems to their Lordships clearly within subsection (3), and the second or manufacturing process, if not within the meaning of "trade" in subsection 1 is certainly included in the words "any other source whatever in sub-section 4"

Their Lordships' view, therefore, was that it is the source of the income which has to be considered, and not the place where it is received.

This case was referred to in <u>In re Aurangabad Mills Limited</u> (4), a decision under section 3(1) of the Act of 1918.

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(3) L.R., 1900 A.C., 588.

(4) (1921) I.L.R. 45 Bombay, 1286.

It was there held that the profits of a company which are made from manufacture carried on beyond British India cannot be said to accruse or arise in British India on account of the head office being in Bombay, where also the directors control the business. Macleod C.J., (at pages 1290 and 1291) after quoting the above cited passage from the judgment of their Lordships remarked that the doubt which might have arisen in Commissioners of Taxation v Kirk (3) whether the profits were not derived at a place where the third and fourth processes were carried out, did not arise in the case before him because all the four processes were carried out in Hyderabad. This case was followed in Board of Revenue v Ripon Press (5). In Commissioner of Income-Tax, Burma v. Messrs. Steel Brothers & Co. Ltd. (6), it was held, applying the principles laid down in Commissioners of Taxation v Kirk (3), that in determining whether any income, profits or gains arise or accrue "we must not be content to look at the last stage of the accrual, but must take into consideration the previous stages as well". The company was non resident in British India, but at mills situate in Burma it worked up commodities and raw materials into forms suitable for use and shipped them to the United Kingdom where they were sold. It was held that the profits or gains accruing to the company in respect of this business must be deemed (within section 42 (1) of the Act) to be income accruing or arising within British India.

Sunder Das v. Collector of Gujrat (7) and Sir Saiyid Ali Imam v the Crown (8) have been cited. These cases deal with the meaning of the expression "received in British India", which is not part of the reference in this case, and need not be discussed.

Reference has been made by the Government Advocate to sections 42 (1) and 18(2A) of the Indian Income Tax Act,

(5) (1923) I.L.R., 46 Madras, 706.
(6) (1925) I.L.R. 3 Rangoon 614-648.
(7) (1922) I.L.R. 3 Lahore, 349.
(8) (1924) I.L.R., 4 Patna, 210.

1922. Section 42 (1) provides that in the case of a non resident, all profits or gains accruing to him through or from any business connection or property in British India is to be deemed to be income accruing or arising within British India. The effect of section 18(2A), which was inserted by Act XVI of 1925, is to render subject to Income Tax any income chargeable under the head "salaries" which is payable to the assessee out of India by or on behalf of Government. These sections do not appear to be of assistance in the general construction of the words "accruing" and "arising" in section 4 (1). They seem to be designed to bring within the ambit of the tax special classes of cases which would otherwise escape. I am unable to appreciate the argument to be found in the reference and which is based on the position of a salary earner. It is said that in his case the salary accrues and arises in the place where he does the work, which is in British India, and that it therefore accrues in British India and is taxable. But this argument overlooks the fact that the Commissioner has expressly held that the remuneration of the assessee is not "salary" and has classified it under "other sources".

If the correct principle be that the words accrue and arise when applied to income are to be governed by the source from which the income accrues and arises, it would appear that in the case referred that source is to be found in Bangkok rather than in Moulmein. The assessee is a Forest Officer in the service of the Siamese Government. It is not stated that his remuneration is in the nature of a commission on the amount of revenue collected. On the contrary it is said to be 600 ticals per mensem. The inference to be drawn is that he would get his remuneration qua Forest Officer, whether he worked in Moulmein collecting royalty, or whether he worked in Siam in that or any other capacity. From this point of view his remuneration accrues and arises in Bangkok where it is payable and is in fact paid. If on the other hand we are to have regard to the definition of the words, the only place where

it would seem that there is a present and enforceablr right on the part of the assessee to demand the remuneration and where it somes into his hand, is also Bangkok.

In conclusion I may refer to the observation of Sir Shadi Lal C.J. in Sundar Das v Collector of Gujrat (7) after citing the rule of interpretation applying to fiscal enactments, that "It is a sound principle that the subject is not to be taxed without clear words to that effect; and that in dubio, you are always to lean against the construction which imposes a burden on the subject". The Government Advocate expressed the view that the Legislature had advisedly refrained from defining the terms accruing and arising. In my view the meaning of the terms, as applied to the facts of the case is as above stated and is perfectly plain. If, on the other hand, the meaning is ambiguous, the sound principle enunciated by Sir Shadi Lal is applicable and it ought to be applied.

I would asnwer the question referred by saying that the income the subject matter of the reference cannot be said to "accrue or arise" in British India" within the meaning of section 4 of the Indian Income Tax Act, 1922.

Sd/ H.L. Ormiston,

Judge.

Delivered by me,

Sd/ H.S. Pratt,

OFFG. CHIEF JUSTICE.
20-6-28.

True copy
J Bivadia
Clerk 27/7/28
Office of the Commissioner of Income-tax, Burma.

NKR 26/7.

IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Dated Rangoon, the 20th day of June 1928.

CIVIL REFERENCE No.2 of 1928.

In re-

The Commissioner of Income-tax. vs. Mr. Phra Phraison Salarak.

For applicant - Mr. Eggar, Government Advocate.

For respondent - Mr. Daniel.

J U D G M E N T.

I have had the advantage of reading my brother Ormiston's judgment and I concur in his proposed answer to the reference.

We are asked to decide whether salary paid in Bangkok by the Siamese Government to the credit of a Siamese Forest Officer, who collected at Moulmein royalties on timber extracted from Siamese forests and floated down to Moulmein, is income accruing or arising in British India within the meaning of section 4 of the Income Tax Act.

The Officer in question resides in Moulmein, presumably for the purposes of his work of collecting royalties.

We are not asked to decide whether the income is "salary" within the meaning of section 7 (1) of the Act, nor whether the portion of the pay remitted from Bangkok to Mr. Salarak in Moulmein can be said to be "received" within the meaning of section 4 (1).

It has been argued by the Government Advocate that for the purposes of the present reference the words "accruing and arising" must be construed as equivalent to "earned."

None of the cases cited is an authority for this contention. Had the Legislature intended to include income earned in British India within the meaning of income "accruing or arising" there, it would have been perfectly simple to say so.

I do not consider salary paid in Siam to a Siamese Official for services rendered in Burma can under the circumstances be regarded as income arising or accruing in British India.

The respondent will be allowed the costs of the reference.

Advocates fee seven gold mohurs.

Sd/ H.S. Pratt,
Offg. Chief Justice.

True copy
Clerk 27/11/28
Office of the Commissioner of Income-tax, Burma.

IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Dated Rangoon the 20th day of June 1928.

Civil Reference No.2 of 1928.

In re-
The Commissioner of Income Tax v. Mr. Phra Phraison Salarak.

For Applicant Mr. A. Eggar.

For Respondent Mr. Daniel.

JUDGMENT.

I also concur. The scope of this Reference has been very much narrowed. The Commissioner has satisfied himself of the answer to the first proposition put forward by the respondent. In that regard the Commissioner holds the view that the respondent's income does not come under the head of "Salary" within the meaning of section 6 of the Act. Nor did the respondent (very wisely, I think) suggest to the Commissioner that he should ask the opinion of the Court as to whether the emolument which he (the respondent) is paid by the Siamese Government is received in British India. All we have to do here is to decide, as my brother Ormiston has pointed out, whether such emolument accrues or arises in British India. It has been held on several occasions that there is no difference between the two words "profits" or "gains" which are used in the section we are considering. I am inclined to think that there is no real difference in law between the words "accruing" and "arising". Some authorities have thought that the word "accrue" suggests a periodical right to money and the word "arise" suggests only a single right or possibly the beginning of a periodical right. But these views seem to me to be refinements and over-refinements of the language of the Statute. To my mind, the double expression "accruing and arising connotes the source from which the right to obtain money springs. Undoubtedly the source here was in the kingdom of Siam, remuneration from the Siamese Government to one of the officers of their Forest Service. In my view, too, the expression "accruing or arising" is used in contradistinction to the word "received", but, as I have pointed out, we are not considering the question of where the money was actually received

or to what place it was remitted after its receipt which may be the same thing - in Law as "received". It was very strongly urged upon us that the real meaning of "accruing" and "arising" as applied to the income of the respondent was to be found in the place where the income was earned; but, for the reason mentioned above, I do not agree with that view.

Sd/ J.R. Ellis Cunliffe,

Judge.

True copy

J. Bwadi 27/7/24

Clerk

Office of the Commissioner of Income-tax, Burma.

NKR 26/7.

IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Civil Reference No.2 of 1928.

The Commissioner of Income-Tax, BURMA. Applicant.

versus.

Mr. Phra Phraison Salarak, Siamese agent, Moulmein. Respondent.

GEORGE V, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

Upon reading a reference made by the Commissioner of Income-tax, Burma, under Section 66(2) of the Indian Income-tax Act (XI of 1922) for decision by a Full Bench of the following question relating to the assessment of Mr. Phra Phraison, Siamese agent, Moulmein, for the Income-tax year 1927-28:

"Whether the salary paid in Bankok by the Siamese Government to the credit of a Siamese Forest Officer, who collected at Moulmein royalties on timber extracted from Siamese Forests and floated down to Moulmein is income accruing or arising in British India within the meaning of Section 4 of the Income-tax Act" and after hearing the Government Advocate for the Commissioner of Income-tax and Mr. Daniel for the respondent.

It is hereby declared and ordered that the income, the subject matter of the reference, cannot be said to "accrue or arise in British India" within the meaning of Section 4 of the Indian Income-tax Act, 1922.

And it is further ordered that the respondent be paid the sum of Rs.119/- as costs of the reference.

And it is further ordered that a copy of this order be sent to the Commissioner of Income-tax, Burma, for record and compliance.

Given under our hands and the Seal of the Court this 20th day of June 1928.

Sd/- H.L. Ormiston, Judge. Sd/- J.R.Ellis Cunliffe, Judge. Sd/ H.S. Pratt, Offg. Chief Justice.

True copy

Clerk 7/7/28

Office of the Commissioner of Income-tax, Burma.

12

[R. O. 106 (a)].

Communications should be addressed to the Secretary to the Resident in Mysore, Bangalore, by designation and not by name.

OFFICE OF THE RESIDENT IN MYSORE,

Bangalore, 15/8/ 1928

No. 7727. ENCLOS. a set of Court papers

A copy of the marginally* noted ~~letter, with enclosure~~ paper, is forwarded to the Collector & Asstt. Comm of Income-tax, Com Sts, Bangalore, for information & favour of return

*~~No. dated~~
~~from the~~
Judgment of the Rangoon High Court in Civil Reference No. 2 of 1928.
(Enclosures 5 Pcs).

for Secretary to the Resident.

Comm^r of Income

532—15-9-1927—5,000—RPB.

K V Ramanathan
13-8-28

No. IT Misc/22/Cy.

Office of the
Collector and Assistant Commissioner of Income-tax,
Civil and Military Station, Bangalore,

Dated the 27th August 192 8

FROM
D. T. Pragasam, Esq., D.Com., C.R.A.,
COLLECTOR AND ASST. COMMR. OF INCOME-TAX,
CIVIL AND MILITARY STATION,
Bangalore.

To

The Secretary to the Resident
and Commissioner of Income-tax,
Civil and MIlitary Station, Bangalore.

OFFICE
31/8
No. 8452
Date 30-8-28

Subject.—

SIR,

273/28

I have the honour to return herewith the Judgment of the High Court of Rangoon in Civil Reference No.2 of 1928 sent with your No.7727 / 273-1928 dated 15th August 1928.

S.N. 12 (Y)

I have the honour to be
Sir
Your most obedient servant,

D.T. Pragasam 27.8.28

For Collector and Assistant
Commr. of Income-tax.

27/8

May be filed

L V Ramanathan
31.8.28

14

D.O.R.Dis.No.259-I.T/28.

CENTRAL BOARD OF REVENUE.

Simla, the 5th October 1928.

My dear Sheehy,

Reference to High Court - Rangoon - Salary paid by Siamese Government - Services rendered in British India - Payment outside British India - Liability to tax - Phra Phraison Salarak - Moulmein.

Your D.O. No.9329/Ap.2/5/27-28, dated the 13th July 1928, to Mr. Tottenham.

(E) S.N.II/a

Please see the Rangoon High Court ruling in the case of Commissioner of Income-tax v. Phra Phraison Salarak. In that case it has been decided that salary paid in Bangkok by the Siamese Government to the credit of a Forest Officer who belonged to the Siamese Government service, but worked in Moulmein where he collected royalties on timber extracted from Siamese forests and floated down to Moulmein, is not income accruing or arising in British India within the meaning of section 4 of the Indian Income tax Act, XI of 1922. The view always held by the Board was that emoluments which are earned by work performed in British India accrue or arise in British India within the meaning of sub-section (1) of section 4 of the Act and are therefore chargeable to Indian Income-tax irrespective of the place at which the payment is made or can be claimed. There is an apparent conflict between this view and that of the Rangoon High Court in the case referred to above. But it seems to the Board that that case can be distinguished. The salary due to the Siamese Forest Officer was not by reason of his work performed at Moulmein but as a member of the Forest Service of the Siamese Government; and he therefore appears to be entitled to the remuneration wholly irrespective of the place where he works. It is possible therefore to hold that his income did not arise or accrue in British India, without contravening the general principle enunciated by the Board. The Board has, therefore, decided to accept the ruling of the Burma High Court while adhering to its views on the general question. The liability of sterling-

overseas pay to Indian income-tax, however, stands on an entirely different footing, as this is due not only in respect of work in British India but in respect of service under the Indian Government. In any view - whether the criterion be the place where the services are rendered or the ultimate source of income - sterling overseas pay is taxable in British India. Ormiston J. was of course wrong in thinking that Section 18(2)A in itself rendered sterling overseas pay taxable. That is only a machinery section and the taxability is determined by Section 4 and the fact that sterling overseas pay accrues or arises in British India.

2. You will see that the Rangoon High Court Ruling does not exempt from tax salaries paid by branches of foreign banks, firms, etc. to their employees in this country. In such cases, obviously, the source of income is in this country and also the remuneration is paid only in respect of work in this country. Their cases can, it seems, be clearly distinguished from those of foreign government servants in British India.

Yours sincerely,

Sd. M.S.Sundaram.
6.10.28.

To

J. F. Sheehy, Esquire, I.C.S.,
Offg. Commissioner of Income-tax, Burma,
Rangoon.

Dy. No. 9873
Date of issue 15/10/28
Cir. No. 273/28

Circular No.38 of 1928.
R.Dis.No.259-I.T/28.

Copy forwarded to all other Commissioners of Income-tax.

By order, etc.,

for Secretary, Central Board of Revenue.

R.S.T.
6.10.28.

BURMA.

No. 18297/A1.149
27-28

From

J.F. CHEEHY, Esq., I.C.S.,

Commissioner of Income-tax, Burma,

Rangoon.

OFFICE OF THE COMMISSIONER OF INCOME TAX IN MYSORE.
Recd. NOV 14 1928
No.
Enclosures, if any. To

The Commissioner of Income-tax,

Bangalore.

INCOME TAX OFFICE BANGALORE.
Diary No. 10814
Date of A... 15/11/28
Y. 27/3/28

Rangoon, the 1st November 1928.

Subject:- Income-tax Act, Indian (XI of 1922) Section 66 (3) - Reference to the High Court - Application of the P.K.N. Firm of Rangoon for a reference in connection with its assessment for 1925-26.

Sir,

I have the honour to forward herewith a copy of the statement in the above case.

I have the honour to be,

Sir,

Your most obedient servant,

1-11-28

P.A.

for Commissioner of Income-tax, Burma.

Draft submitted

(For precedent, vide S.N. 12)

(Y)

16.11.28

HKR 1/11.

16

BURMA.

No. 18134/Ap-76
28-29

OFFICE OF THE COMMISSIONER OF INCOME TAX IN BURMA
From
Recd. NOV 14 1928
No.
Enclosures, if any.

J. E. SHENNY, ESQ., I.C.S.,
Commissioner of Income-tax, Burma,
Rangoon.

To

The Commissioner of Income-tax,
Bangalore.

Rangoon, the 1st November 1928.

Subject:- Income-tax Act, Indian (XI of 1922), Section 66 (2) - Reference to the High Court - Statement of Case by Commissioner Assessment of the R.M.P. Chettyar Firm of Gyobingauk, for the year 1927-28.

Sir,

I have the honour to forward herewith a copy of the statement in the above case.

I have the honour to be,

Sir,

Your most obedient servant,

1.11.28

D.A.
for Commissioner of Income-tax, Burma.

31-10-28

MKR 31/10.

[R. O. 206 (a)1.

All communications should be addressed to the Secretary to the Resident in Mysore, Bangalore, by designation and not by name.

OFFICE OF THE RESIDENT IN MYSORE, 17

Bangalore, 29. 11. 1928

No. 10 987 ENCLOS.

A copy of the marginally* noted ~~letter, with enclosure~~ papers, is forwarded to the Collector & Asstt. Comm^r of Income-tax, Coorg, Bangalore for information & favour of return.

*No. ——— ~~dated~~ ~~from the~~ Statements of facts & of opinion, by The Comm^r of Income-tax, Burma with reference to the applications by Messrs. P.K.N. Chettiyar & R.M.P Chettiyar under sec. 66 of The Income-tax Act

Secretary to the Resident.

532—15-9-1927—5,000—RPB.

C.V Ramanathan
16.11.28

OFFICE OF THE COMMISSIONER OF INCOME TAX IN BURMA.
Recd. Nov 20 1928
No,
Enclosures, if any.

No. 18877 / Ap.66 / 28-29.

From

J. F. SHEEHY, Esq., I.C.S.,
Commissioner of Income-tax, Burma.

To

The Commissioner of Income-tax,
BANGALORE.

Dated Rangoon, the 16 November, 1928.

Subject:- Income-tax Act, Indian (XI of 1922) - Section 66(2) - Reference to the High Court - Statement of case by Commissioner - Assessment of Messrs. Tong Hock Hin of No. 49, Strand Road, Rangoon, for the year 1927-28.

* * * *

Sir,

I have the honour to forward herewith a copy of the statement in the above case.

I have the honour to be,

Sir,

Your most obedient servant,

8.11.28

P.A.,
for Commissioner of Income-tax, Burma.

TKR/5-11.

Draft submitted.
(For precedent, vide 3.IV.12).

C.V. Ramanathan
24.11.28

No. 18859/ Ad.36 27-28

OFFICE OF THE COMMISSIONER OF INCOME TAX IN BURMA.
Recd. Nov 20 1928
No.
Enclosures, if any.

From

J. F. SMITHY, Esq., I.C.S.,
Commissioner of Income-tax, Burma.

To

The Commissioner of Income-tax,
BANGALORE.

Dated Rangoon, the 10th November, 1928.

Subject:- Income-tax Act, Indian (XI of 1922) - Section 66(3) - Reference to the High Court - Application of Messrs. Chan Low Chwan of Rangoon, for a reference in connection with its assessment for 1925-26.

Sir,

I have the honour to forward herewith a copy of the statement in the above case.

I have the honour to be,

Sir,

Your most obedient servant,

for Commissioner of Income-tax, Burma.

TKR/7-11.

[R. O. 106 (a)].

All communications should be addressed to the Secretary to the Resident in Mysore, Bangalore, by designation and not by name.

OFFICE OF THE RESIDENT IN MYSORE,

Bangalore, 1.12. 1928

No. W 66 ENCLOS. 2

A copy of the marginally* noted ~~letter, with enclosure,~~ papers is forwarded to the Collector & Asstt. Commr. of Income-tax, Coimbatore, Bangalore, for information & favour of return.

*No. ~~dated~~ ~~from the~~

Statements by the Commr of Income-tax in the following cases:—

(i) Assessment of Messrs. Tong Hock Hui, Rangoon

(ii) Assessment of Messrs. Chan Loi Chiran Rangoon

Secretary to the Resident.

532—15-9-1927—5,000—RPB.

C. V. Ramanathan 28.11.28

OFFICE OF THE COMMISSIONER OF INCOME TAX IN BURMA
Recd. DEC 4 1928.
No,
Enclosures, if any.

OFFICE OF THE COMMISSIONER OF INCOME-TAX, BURMA.

N O T I F I C A T I O N.

Dated Rangoon, the 6th November 1928.

No. 110. In exercise of the powers conferred by sub-section (4) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), the Income-tax Officer, Companies Circle, Rangoon, is hereby appointed as the Special Income-tax Officer for dealing with the assessment of non-residents, the whole of whose income from dividends or other sources arises in Burma.

This department Notification No. 55, dated the 27th June 1927, is hereby superseded.

Sd/- J. F. [illegible],
Commissioner of Income-tax, Burma.

No. 19775/ C.I.-21/27

Dated Rangoon, the 27th November 1928.

A copy is forwarded to the Commissioner of Income-tax, Bangalore, for information.

for Commissioner of Income-tax, Burma.

No. 11399 11/12/28

Copy forwarded to
the Coll? & Asstt Comm?
of Income-tax C.O.M
station, Bangalore.

for Secy to the Resd
Comm? of I.T.

V. Ramanatham
6.12.28

No. I.T.Mis/38/E.4.

Office of the
Collector and Assistant Commissioner of Income-tax,
Civil and Military Station, Bangalore,

Dated the 17th December 1928

FROM
G. H. Cooke, Esq., M.C., I.C.S.,
COLLECTOR AND ASST. COMMR. OF INCOME-TAX,
CIVIL AND MILITARY STATION,
Bangalore.

To

The Secretary to the Resident
and Commissioner of Income-tax,
Civil and Military Station, Bangalore.

RESIDENT'S OFFICE
Bangalore.
Register No. 12058
Date of Receipt 20/12/28

Subject.—

SIR,

The Statements of facts and of opinion by the Commissioner of Income-tax, Burma, with reference to the applications by Messrs.P.K.N. Chettyar and R.M.P.Chettyar and his statements in the assessment of Messrs. Tong Hock Hin and Chan Low Chwan, Rangoon received with your Nos. 10987 and 11066/273-1928 dated 29-11-1928 and 1-12-1928, respectively, are herewith returned.

(J) S.K.17
(W) S.K.20

I have the honour to be,
Sir,
Your most obedient servant,

Collector and Assistant
Commr. of Income-tax.

May be filed
C.V.Ramanathan
21.12.28

INCOME-TAX ACT, INDIAN (XI OF 1922)—SECTION 66 (2)—REFERENCE TO THE HIGH COURT—STATEMENT OF CASE BY COMMISSIONER—ASSESSMENT OF MESSRS. TONG HOCK HIN OF No. 49, STRAND ROAD, RANGOON, FOR THE YEAR 1927-28.

STATEMENT OF FACTS AND OF OPINION BY COMMISSIONER OF INCOME-TAX, BURMA.

RANGOON: OFFICE OF THE SUPERINTENDENT, GOVERNMENT PRINTING AND STATIONERY, BURMA. NOVEMBER 1928.

SUBJECT.—*Income-tax Act*, 1922,—*section* 66 (2)—*Statement of case by Commissioner—Assessment of Messrs. Tong Hock Hin of No.* 49, *Strand Road, Rangoon, for the year* 1927-28.

The following reference is made under the provisions of section 66 (2) of the Indian Income-tax Act on the application of Messrs. Tong Hock Hin of No. 49, Strand Road, Rangoon, in respect of their assessment for the year 1927-28.

2. The main point involved is the question of the rejection as spurious of the accounts produced by the firm for the 1927-28 assessment and the determination of their income on an estimate basis. For a proper appreciation of the point at issue it is necessary to state the history of the assessees' assessments for previous years.

3. The assessees are rice-millers and rice merchants. They have their head office at Rangoon and their rice-mills in the Tharrawaddy District. They are also owners of house-property.

For the 1924-25 assessment, the assessees returned a loss from business of Rs. 1,86,270. This loss was claimed to have occurred in connection with speculation in rice. No details were given in the accounts produced. Losses in respect of various contracts were shewn in lump sums. There were no purchase or sales notes. While these accounts could not be checked or relied upon in any degree, the Income-tax Officer found that it was true that the firm did not do good business in the relevant accounting year and accordingly accepted the position that no profits were made. The income from house-property amounting to Rs. 29,103 was taxed, no set-off being allowed as the loss claimed in respect of business was not proved.

For the 1925-26 assessment, the assessees declared a loss of Rs. 5,216. The accounts which were produced, however, showed that there was no loss, but they were so incomplete and faulty that no reliance whatever could be placed on them. There were no sales accounts for the business carried on with rice merchants in the Straits. Certain payments made to the assessees by other Chinese firms on account of interest on loans advanced by the assessees were not shewn in the assessees' Interest Account, although an Interest Account was maintained. These payments were not denied by the assessees. There was no Consignment Account showing the consignments received from the firm's mills in the Tharrawaddy District. In short, the accounts were so incomplete and also so demonstrably false in parts that they had to be rejected and the income determined on an estimate basis. The figures of income adopted were as follows :—

Rs.	1,20,000 from Business.
Rs.	40,000 from Interest on loans made by the firm.
Rs.	40,836 from Property.
Rs.	1,211 from Other Sources.
Rs.	2,02,047

For the 1926-27 assessment, the firm returned an income of Rs. 95,912, the income from business being returned as Rs. 63,638. On the basis of the accounts produced, however, the income of the business was found to be Rs. 79,576, that is, after adding certain items which should have been added back for income-tax purposes. Here again, the accounts were found to be incomplete and faulty to a degree which indicated that they were *ad hoc* productions prepared for income-tax purposes. Sales were shewn at abnormally low rates. Another fact which went to prove that the accounts were untrustworthy was that whereas the accounts of another assessee showed a purchase from this concern of rice at Rs. 522-8 per 100 baskets, not a single transaction

in the assessees' accounts showed a transaction at that rate, the rates shewn in the assessees' books being markedly lower. The assessees were asked to trace the particular sale in their accounts. They were unable to trace the transaction though their own Sales Note in respect of it was made available to them, nor were they able to offer any explanation in regard to the omission. This definitely proved the accounts to be false and they were accordingly rejected. The profits from the business were computed at Rs. 2,00,000 and the profits from the loans made by the firm at Rs. 60,000. The income from property was determined as Rs. 41,287. Total Rs. 3,01,287. There was an appeal to the Assistant Commissioner. The appellate officer upheld the action of the Income-tax Officer in rejecting the accounts for the purpose of assessment, but reduced the assessment by a sum of Rs. 13,149 on other grounds.

4. For the 1927-28 assessment, the assessment now in question, the assessees returned an income of Rs. 65,947, being Rs. 38,929 from business and Rs. 27,018 from house-property. The head-office accounts and the accounts of the mills at Tharrawaddy were produced. These accounts also were found to be unsatisfactory, and the assessees were called upon to supply explanations in respect of several discrepancies and omissions noticed by the Income-tax Officer. They or their representatives were summoned for this purpose on six occasions and such explanations as they had to offer in regard to both the incompleteness of the accounts and the particular errors noticed in them were recorded. Finally, the Income-tax Officer rejected the accounts as unreliable for the reasons specified in the assessment order (Exhibit A) and made the assessment, as in previous years, on an estimate basis, the income determined being Rs. 2,25,000 from business and Rs. 60,000 from interest. The assessees' figure for income from property was accepted. On appeal, the Assistant Commissioner reduced the income from business by Rs. 25,000, but confirmed the action of the Income-tax Officer in rejecting the accounts. The Assistant Commissioner held that the probable conclusion from the nature of the errors and omissions in the accounts was that they had been concocted for income-tax purposes. He further noted that, even if such were not the case, the accounts in his opinion were maintained in so careless and slipshod a manner that no use whatever could be made of them. (A copy of his order is attached as Exhibit B).

5. The two questions which I am asked to refer to the High Court are reproduced below :—

(i) Whether an estimated assessment of an arbitrary nature on insufficient evidence can in law be made in petitioner's case without any details to show how the amount determined upon was arrived at ?

(ii) Whether after the accounts had been rejected an assessee should not be given a chance after due notice to explain the accounts put forward ?

6. The first question cannot be referred in the terms stated inasmuch as it assumes that the assessment was made on an arbitrary basis. The question, which can be said to arise, is :—

> Whether an assessment can, in the circumstances of this case, that is, where the accounts are rejected as untrustworthy, be made on insufficient materials and whether in such case it is incumbent on the assessing officer to set out the exact details of his computation ?

The answer to this question will be found in section 13 of the Act. The proviso to this section enacts :—

> Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine.

In the present case the income could not be determined on the basis of the accounts produced by the assessee and so the Income-tax Officer acting in accordance with the said proviso computed it on the available materials including past assessments and his knowledge of similar businesses and of this business in particular. There is no provision in this section or in any other section of the Act requiring the Income-tax Officer to give details of his computation. The position is that whether materials are insufficient or not the law requires

the Income-tax Officer to make an assessment. In this connection, I would invite a reference to the remarks of Lord Mackenzie in *Macpherson & Co.* v. *Moore* (6 Tax Cases, page 115) :—

> If the Act of Parliament says the amount of profits is to be ascertained, ascertained they must be whether that can be done in a satisfactory method or not.

and to the remarks of the Lord President in the same case (*ibid*, page 114) :—

> Messrs. Macpherson & Co., who, if they do not choose, as they have not chosen, to state an account so that the amount of profits may be strictly determined, cannot complain if a random assessment is made upon them by the Crown.

In my opinion, therefore, the first part of the question, as reconstructed, should be answered in the affirmative and the latter part in the negative.

7. The reply to the second question, in my opinion, is to be found in sub-sections (*2*) and (*3*) of section 23. If the Income-tax Officer has reason to believe that a return is incorrect or incomplete, he must serve on the assessee a notice requiring him either to attend or to produce any evidence on which he may rely in support of the return. And, after hearing such evidence as the assessee may produce and such other evidence as the officer may require on specified points, he must make the assessment. As has been indicated in paragraph 4 above, no less than six notices were issued under section 23 (*2*) to the assessees. The assessees or their representatives were examined on six occasions and their statements recorded. In the course of these appearances and examinations it was made abundantly clear to the assessees and their representatives that the accounts were regarded as incomplete and unreliable and they were asked for explanations as regards the omissions and errors on which the Income-tax Officer based that conclusion.

So much for the facts. The legal position, however, is that there is nothing in the Act specifically requiring an Income-tax Officer to inform the assessee of his grounds for discrediting his accounts or other evidence and that therefore it is not legally incumbent on the Income-tax Officer to do so. Consequently, even if there had been failure to do so, such failure would not invalidate the assessment. In my opinion, therefore, this question should be answered in the negative.

J. F. SHEEHY,
Commissioner of Income-tax, Burma.

Dated Rangoon, the 5th November ~~October~~ 1928.

EXHIBIT A.

INCOME-TAX DEPARTMENT.

Taroktan Circle.

(1) Year of assessment—1927-28.
(2) Name of Assessee (with complete address)—Tong Hock Hin, 49, Strand Road.
(3) Status—Registered Firm.
(4) Sources of income with exact nature of business—Business, Rice Millers and Merchants, Commission Agents and Landlords.
(5) Branches :—
  (*a*) Zigôn.
  (*b*) Letpadan.
(6) Shares in—
  (*a*) Registered, and
  (*b*) Unregistered Firms. *Nil.*
(7) Partners—
  (*a*) Names with shares—
    Chan Han Gyan.
    Chan Chi Nyo.
  (*b*) Are they separately assessed—
    Yes, to super-tax,
(8) Income returned—Rs. 65,947.
(9) Accounts—
  (*a*) Books produced—34 account books.
  (*b*) Method of accounting : Four-legged.
  (*c*) Accounting period—31st December 1925—19th December 1926.
(10) Section and Sub-section under which assessment made—23 (3).

Assessment Order or Note.

The assessees are big rice millers and rice merchants. They own two mills in the Tharrawaddy District where they buy paddy, mill it and bring it down to Rangoon for sale by their head office. The head office also sell rice for others on commission. Considerable house-property is also owned in Rangoon. The firm is a registered one consisting of two partners, *viz.*, one Chan Han Gyan and one Chan Chi Nyo who is the widow of Chan Han Gyan's late brother. Return has been filed declaring a total income of Rs. 65,947 made up of Rs. 38,928 from business and Rs. 27,018 from property. In response to a notice for production of accounts the head office accounts and the accounts of the two mills in the Tharrawaddy District were produced. Subsequently a set of accounts relating to a third mill in the Tharrawaddy District were produced because it was thought by me that this mill was being worked as part of the business of Tong Hock Hin. The assessees contended that the third mill worked in the name of Eng Hup Hin was not theirs, but was the business of two partners one of whom is the son-in-law of Chan Han Gyan. On first examination the accounts of Eng Hup Hin appeared to indicate that the business was part of the partnership business of Tong Hock Hin but explanations have been made which shew that there is considerable doubt in this matter and in consequence the assessees must be given the benefit of that doubt. The books and Profit and Loss accounts produced by the assessees shew the following results :—

	Rs.
Rangoon property accounts. Loss	28,125
Rangoon Rice Commission and money-lending business. Profit ...	41,135
Zigôn rice mill. Profit	8,503
Letpadan rice mill. Profit	13,633

The figures declared by the assessees in their return have been arrived at after making certain adjustments as shewn in the statements which accompanied their return. If the books produced were acceptable the assessment would have to be made on the figures declared by the assessees. But for the following reasons the accounts must be rejected as not shewing the true results of the previous year's business and as not being either genuine or complete.

Rangoon Accounts.

(i) Assessees pay godown rent and other charges on consignments of rice sent down to them for sale and they maintain ledger accounts for such charges. They recover these expenses by deduction from sale proceeds. But instead of crediting the respective ledger accounts at the time the recoveries are made lump-sum entries are made in the ledger at the end of the year because it is said there is only one clerk. Had the accounts been genuine and regularly maintained this would not be the procedure.

(ii) The books shew that on 2nd October 1926, the assessees sold a big quantity of Sugandi rice for Rs. 620 per 100 baskets. On the following dates sales of the same rice were made at Rs. 540 per 100 baskets, 6th October 1926, 8th October 1926, 10th October 1926, 13th October 1926, 14th October 1926, 16th October 1926 and 17th October 1926. These later sales were made under contract and incidentally the contracts under which they were made are missing from the file of contracts produced by the assessees.

(iii) Dividends amounting to Rs. 9,300 from the Chinese Overseas Bank, received during the accounts period have been omitted from the accounts. The explanation for this omission is that the money not being received in the office was not entered in the accounts. The fact remains that, this income is income from the firm's investments; had the books been genuine the amount would have appeared in them as credits to the partners' personal accounts.

(iv) All consignments are debited separately in the consignment books. The sales however cannot be identified with each consignment and in view of the incompleteness of the rice contracts no check is possible. Ordinarily in Chinese accounts the Journal and the Consignment Books should cross check. If the rice contracts were complete a check may have been possible. The assessees have tried to prove the correctness of their sales from counterfoils of bills, but the bill counterfoils are as likely to be incomplete as the rice contracts.

(v) Though there were errors in posting the bank accounts, in assessee's ledger, the balances at the end of the year in the ledger and chetty pass book agree. The explanation for this is that though there was an overcredit amounting to Rs. 10,000 on the day the accounts were closed, the balance was correct because of a compensating mistake in debits in March 1926. The error in March was not discovered because cash is never checked with the books. This gives one an idea of the value of the accounts books as authentic records of assessees, transactions.

Lepadan Rice Mill Accounts.

(i) The opening stock of paddy valued at Rs. 1,12,484 was omitted from the accounts, it is said, by an oversight and taken to account when the books were closed. Considering the assessees send all their rice down to Rangoon for sale and have to debit the head office it is certainly not clear how they did so when their books did not shew the value of opening stock of paddy milled.

(ii) The mill consignment books and journal cannot be cross checked.

(iii) The accounts shew insurance premia paid as Rs. 7,164. The insurance premia receipts produced shew Rs. 6,161.

Zigôn Mill.

(i) The insurance premia shewn as paid in the accounts is Rs. 6,338. When askad for receipts the assessees produced receipts which shewed that Rs. 11,138 had been paid. The explanation for this difference is that certuin sums had been paid in the name of assessees by persons who had stored paddy in their mill. This story is not believable. Owners of paddy are not likely to insure their stocks and pay premia in the name of some one else and be at the mercy of the other person in case of a claim having to be preferred. I need hardly say anything further about the accounts. I must reject them as in previous years and make the assessment on estimated income so far as it relates to business. The property income as computed by the assessees' advocate will be accepted as correct. The assessment will be made on income as shown below:—

	Rs.
Estimated income from rice business, own and on commission ...	2,25,000
Estimated income from interest	60,000
Dividends admittedly received in Burma and not taxed	9,300
Property	38,928
	3,33,228

Rate—18 pies.

	Rs.	A.	P.
Tax on Rs. 3,00,000	28,125	0	0
33,000	3,093	12	0
228	21	6	0
	31,240	2	0

Issue demand notice for Rs. 31,240-2-0, payable on or before 22nd March 1928. Super-tax will be recovered from the partners.

J. F. BLAKE,—13-3-28,
Income-tax officer.

EXHIBIT B.

IN THE OFFICE OF THE ASSISTANT COMMISSIONER OF INCOME-TAX, RANGOON.

Date of Order.—The 1st June 1928.

Income-tax Appeal No. 5 of 1928-29.

Instituted on the 3rd April 1928 from the order of the Income-tax Officer, Taroktan Circle, Rangoon.

Tong Hock Hin, No. 49, Strand Road, Rangoon—Appellants.

Dates of hearing—10th and 16th May 1928.

Present for Appellants—Mr. C. S. Ekambaram, B.A.,B.L.

Appellate Order and grounds of Decision.

This is an appeal against an assessment for 1927-28 on an income of Rs. 3,33,228. The appellants are big rice millers and rice merchants. For the assessment they produced account books in Chinese and these were examined by the Chinese Accountant of the Income-tax Department and as a result of the examination and the explanations given by the appellants, the Income-tax Officer rejected the accounts as unreliable and made an estimate of appellants' income from business. The rejection of the accounts is the main ground of appeal.

2. The Income-tax Officer gives nine reasons for considering the accounts unreliable. Of these I have found the first two, which relate to the godown rent account and to sales of Sugandi rice at varying prices, to be entirely without substance. But in examining the godown rent account, I have found, in the case of the only two items I examined, that the total debit in the godown rent account was, in the case of two consignees, different from the total of the godown rent charges as shown in the consignment accounts. The amounts involved are small, but it shows in what a slipshod manner the accounts have been maintained and how little, if at all they have been checked.

3. The next point made by the Income-tax Officer is that a dividend of Rs. 9,300 on an investment of 100,000 dollars in the Chinese Overseas Bank of Singapore has been omitted from the accounts. Appellants say that this has been treated as a family investment and as it did not pass through the office, it was not entered in the accounts. Appellants before me mentioned that it was a private investment and had nothing to do with the business, but there is no proof of this. On the other hand, the Bank's letter forwarding the dividend shows that the investment is in the names of the two partners of the appellant firm and this, to my mind, is sufficient proof that the investment is a partnership investment and that the proceeds should have been brought into account. The contention that this receipt was left out of account because it did not pass through the office is probably correct. Appellants' advocate stated that the senior partner, an old man who knows no English, told him that he kept accounts only because he had to do so for the purposes of income-tax. These accounts would naturally be for the rice business and a receipt of this sort might easily be omitted without any ulterior motive. At the same time, the fact that one receipt is omitted gives rise, in conjunction with the slipshod way in which the accounts have been kept, to the suspicion that other receipts may also have been omitted.

4. In connection with the Rangoon accounts and the Letpadan accounts, the Income-tax Officer points out that the journal and the consignment books cannot be cross checked. It is not possible, for example, to identify sales with any particular consignment. The appellants admit this, but point out that consignments are not stacked separately and that rebagging takes places. That may be the fact, but still if accounts which are under suspicion cannot be properly checked, this affords some reason for rejecting them.

5. The accounts were closed towards the end of December 1926 and on the closing day an excess credit of Rs. 10,000 was entered in the bank account in the ledger. Nevertheless the closing balance was correct and this unusual state of affairs was due to the fact that an excess debit had been made in March 1926 and remained undetected all through the year. The explanation given is that the senior partner's son was in charge of the cash and no one bothered to check it. As the Income-tax Officer rightly points out this reflects seriously on the accounts as a proper record of appellants' business transactions.

6. In the Letpadan Rice Mill accounts the opening stock of rice worth Rs. 1,12,484 was omitted from the accounts until the books were about to be closed. Appellants say that this is a clerical omission, a mere matter of posting, which does not affect the reliability of the accounts. It has been explained to me that the godown keeper is in charge of the paddy and looks after the milling and that the clerk is separately in charge of the accounts. But this, in my opinion, does not explain a state of affairs which, to say the least, is most unusual. With this large opening stock left out of account, the appellants would find that they were turning out a quantity of rice greater than the quantity of paddy they had purchased if they kept any proper accounts at all of the matter and they would, therefore, soon have discovered that something was wrong and that this opening stock had not been taken into account.

7. The other two points raised by the Income-tax Officer concern insurance premia and are of no great importance. In one of them, *viz.*, that the insurance receipts shown amount to Rs. 6,161 while Rs. 7,164 has been claimed, there is no substance. The amount claimed is correct. The other point has been sufficiently explained by appellants.

8. These errors and omissions in the accounts are, in my opinion, sufficient reason for rejecting them. In this matter of accounts, the appellants have a bad record so far as the Income-tax Department is concerned. Their accounts have been rejected for the previous three years and last year the Income-tax Officer found out from the accounts of another assessee that appellants had sold rice at a price higher than any sale price shown in their accounts. It is very probable in view of the previous record of appellants and of the errors and omissions in the accounts now under consideration, that these accounts have been concocted for income-tax purposes, but even if this is not the fact, the accounts are not worthy of acceptance as a complete record of appellants' transactions, since they have been kept in such a careless and slipshod manner. I entirely agree therefore with the Income-tax Officer in rejecting these accounts.

9. As to the estimate adopted of the income from the appellants' rice business, *viz.*, Rs. 2,25,000, the Income-tax Officer gives in his order no particular reason for adopting this figure but he was obviously of opinion that appellants made more than in the previous year when he estimated their income from this source to be Rs. 2,00,000. I cannot uphold this increase in the assessment, since it is not supported by any reason. I therefore reduce the the estimated income from this source by Rs. 25,000 to the figure adopted last year.

10. The assessment is accordingly reduced by Rs. 25,000 from Rs. 3,33,228 to Rs. 3,08,228. Income-tax at 18 pies on Rs. 3,08,228 amounts to Rs. 28,896-6.

J. F. SHEEHY,
Assistant Commissioner of Income-tax, Rangoon.

G.B.C.P.O.—No. 5, C.I.T., 31-10-28.—50.

INCOME-TAX ACT, INDIAN (XI OF 1922)—SECTION 66 (3)—REFERENCE TO THE HIGH COURT. APPLICATION OF MESSRS. CHAN LOW CHWAN OF RANGOON, FOR A REFERENCE IN CONNECTION WITH ITS ASSESSMENT FOR 1925-26.

STATEMENT OF FACTS AND OF OPINION BY COMMISSIONER OF INCOME-TAX, BURMA.

RANGOON : OFFICE OF THE SUPERINTENDENT, GOVERNMENT PRINTING AND STATIONERY, BURMA. NOVEMBER 1928.

been done. Assessee's large borrowing during the accounting year shows that he is not contracting but enlarging his business."

In the application to the Commissioner for a reference to the High Court, the main question was whether there was sufficient justification for the rejection by the Income-tax Officer of the books of account produced by the assessee. My predecessor came to the conclusion that there was plenty of evidence before the Income-tax Officer and in his (my predecessor's) opinion it was incredible that the assessee should be expanding his business if he had made losses for the last three years. And my predecessor also was forced to the conclusion that the accounts were not genuine. In a business of this magnitude, there can be no doubt that proper and fuller accounts were maintained for the branch purchases.

5. As regards the first part of the question at issue, the relevant provisions of the Act are contained in Sections 13 and 23. Section 13 provides that the method of accounting regularly employed by the assessee should be adopted for the purpose of computing the income, subject to the proviso that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine. The position is that, even where there are accounts available for the assessment, the law allows the Income-tax Officer discretion in the matter of accepting or rejecting those accounts. Where, as in the present case, accounts are rejected as spurious, the position is the same as if there were no accounts at all and therefore the Income-tax Officer is authorised to make the assessment upon such basis and in such manner as he may determine. Turning to Section 23, which deals with the making of an assessment, sub-section (1) of this section provides that, if a return made is correct and complete, the assessment shall be made on the basis of such return. Where the return is incorrect or incomplete, the assessment is made under section 23 (3) after considering such evidence as the assessee may offer in support of his return. Where no valid return is filed or where there is any default in the matter of producing accounts under Section 22 (4) or in the matter of complying with requisitions under Section 23 (2), the law (Section 23) (4) directs the Income-tax Officer to make the assessment to the best of his judgment. Whether acting under Section 23 (3) or under Section 23 (4), an Income-tax Officer may have—and in a large number of cases actually has—to make the assessment on insufficient materials; but whether the materials are insufficient or not the law requires him to make an assessment. In this connection, I would invite a reference to the remarks of Lord Mackenzie in *Macpherson & Co.* v. *Moore* (6 Tax Cases, page 115):

"If the Act of Parliament says the amount of profits is to be ascertained, ascertained they must be whether that can be done in a satisfactory method or not."

and to the remarks of the Lord President in the same case (*ibid*, page 114):

"Messrs. Macpherson & Co., who if they don't choose as they have not chosen, to state an account so that the amount of profits may be strictly determined, cannot complain if a random assessment is made upon them by the Crown."

In my opinion, therefore, the first part of the question should be answered in the affirmative.

6. The reply to the second question, in my opinion, is to be found in sub-sections (2) and (3) of Section 23. If the Income-tax Officer has reason to believe that a return is incorrect or incomplete, he must serve on the assessee a notice requiring him either to attend or to produce any evidence on which he may rely in support of the return. And after hearing such evidence as the assessee may produce and such other evidence as the officer may require on specified points, he must make the assessment.

I find from the proceedings that two notices were issued under Section 23 (2) and also an informal notice requiring the assessee's attendance. The assessee was examined on two occasions and his statements were recorded. But he was not questioned on the specific points which formed the grounds for the officer rejecting the accounts.

In my opinion, there is nothing in the Act specifically requiring an Income-tax Officer to inform the assessee of his grounds for discrediting his accounts or other evidence. Therefore, it is not legally incumbent on the Income-tax Officer to do so and consequently his failure to do so cannot invalidate the assessment. Under departmental instructions the Income-tax Officer ought to have given the assessee an opportunity of meeting his criticisms of the accounts. But the case did not depend on these objections, for there were other indications that the accounts were spurious, as pointed out above. The Assistant Commissioner came to the same opinion on the admitted figure of the capital employed in the business.

7. In the questions which the assessee asked the Commissioner to refer to the High Court, I am of opinion that, eliminating the matter of the discrepancies, there was no question of law which could not be answered by a re-statement of the sections above mentioned.

J. F. SHEEHY,
Commissioner of Income-tax, Burma.

Dated Rangoon, the 5th November ~~October~~ 1928.

G.B C.P.O.—No. 6, Com. of I.-Tax., 31-10-28—50.

INCOME-TAX ACT, INDIAN (XI OF 1922), SECTION 66 (*3*)—REFERENCE TO THE HIGH COURT—APPLICATION OF THE P. K. N. CHETTYAR FIRM OF RANGOON, FOR A REFERENCE IN CONNECTION WITH ITS ASSESSMENT FOR 1925-26.

STATEMENT OF FACTS AND OF OPINION BY COMMISSIONER OF INCOME-TAX, BURMA.

RANGOON : OFFICE OF THE SUPERINTENDENT, GOVERNMENT PRINTING AND STATIONERY, BURMA: OCTOBER 1928.

SUBJECT.—*Income-tax Act, Indian (XI of 1922), Section 66 (3)—Reference to the High Court—Application of the P. K. N. Chettyar Firm of Rangoon, for a reference in connection with its assessment for* 1925-26.

In pursuance of the order of the High Court of Judicature, Rangoon, dated the 24th August 1928, in Civil Miscellaneous Application No. 70 of 1928, the following case is stated for the decision of the High Court under the provisions of section 66 (3) of the Indian Income-tax Act, 1922.

2. The P. K. N. Chettyar firm which is the applicant in the present case has questioned the legality of an assessment made on it for the year 1925-26, under the provisions of section 23 (4) of the Indian Income-tax Act, on several grounds. The order of the High Court in question directs me, however, to state and refer the case with reference to one of the grounds on which the validity is contested, namely, the contention that, the assessee having made a return, the assessment under section 23 (4) for non-compliance with the terms of a notice issued under section 22 (4), is invalid. Precisely the same question has been raised in other High Courts in India and, in view of conflicting decisions, this Hon'ble Court has directed that the question should be stated for a ruling by it.

The question may be set out as follows :—

"After an assessee has made a return of his income under section 22 (2), can the assessment be made under section 23 (4) of the Act for non-compliance with the terms of a notice under section 22 (4) ?"

3. In the case of *Brij Raj Rang Lal* v. *Commissioner of Income-tax, Behar and Orissa*, A.I.R. (1927), Pat. 390, the Patna High Court in dealing with the construction of sections 22 (4) and 23 (4) of the Income-tax Act expressed the view that accounts or documents can be called for by the Income-tax Officer under section 22 (4) after issue of notice under section 22 (2) and before the filing of the return, and that after the filing of the return the Income-tax Officer should proceed under sections 23 (2), 23 (3) and 37 to secure whatever accounts or documents he may require. Proceeding on this construction, the High Court took the view that non-compliance with a notice under section 22 (4) where such notice is issued after the receipt of the return does not authorise the Income-tax Officer to make a summary assessment to the best of his judgment under clause (4) of section 23.

The same view was taken by the Lahore High Court in the case of *Messrs. Khushi Ram Karan Chand* v. *Commissioner of Income-tax, Punjab.* (Case No. 549 of 1926, decided on 22nd December 1927.) But the Allahabad High Court in Miscellaneous Case No. 1027 of 1927 (decided on 4th January 1928) dissented from this view.

The Calcutta High Court also on a reference made by the Commissioner of Income-tax, Bengal, under section 66 (2) of the Income-tax Act (in the matter of *Messsrs. Harmukhrai Dulichand*, decided on 26th March 1928) held that the power given to the Income-tax Officer by section 22 (4) to call for accounts is not impaired by anything in section 23 (4) and that non-compliance with a notice under section 22 (4) issued at any time in the course of an assessment constitutes a default necessitating the application of section 23 (4). Subsequent to this judgment, the *Brij Raj Rang Lal* case was reconsidered by a Bench of the Patna High Court, and the decision, following that of the Calcutta High Court, was that the decision in the *Brij Raj Rang Lal* case in so far as it was a decision on the construction of section 22 (4), was wrong (case decided on 12th June 1928).

4. Under the Act, I am required to give my opinion on the question at issue in this case. The relevant portion of section 22 (4) of the Act is as follows :—

"The Income-tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under sub-section (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require."

The only condition to be fulfilled for the valid employment of this provision is that, except in the case of a company, a previous notice under section 22 (2) requiring the submission of a return should have issued. No other condition is imposed or contemplated.

The other relevant provision of the Act is section 23 (4) which enacts:—

"If the principal officer of any company or any other person fails to make a return under sub-section (1) or sub-section (2) of section 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment."

There are three categories of default which make an assessment under this sub-section obligatory :—

(1) Failure to make a return,
(2) Failure to comply with a notice under section 22 (4), and
(3) Failure to comply with a notice under section 23 (2).

These are three distinct categories and if there is default under any one of them, the Income-tax Officer must make the assessment under section 23 (4). The only disturbing element in the acceptance of this view in the cases referred to above was the existence of the words "having made a return" in section 23 (4). In my opinion, these words have no reference whatever to the power conferred on the Income-tax Officer by section 22 (4), nor do they have the effect of excluding from the purview of section 23 (4) a default under the second category after a return is made. They simply indicate that a notice under section 23 (2), and therefore a default in respect of it, can only eventuate after a return has been filed.

I am of opinion, therefore, that the question referred should be answered in the affirmative.

J. F. SHEEHY,
Commissioner of Income-tax, Burma.

RANGOON, *the* 31st *October* 1928.

G.B.C.P.O.—No. 4, C.I.T., 26-10-1928—50.

INCOME-TAX ACT, INDIAN (XI OF 1922), SECTION 66 (2)—REFERENCE TO THE HIGH COURT—STATEMENT OF CASE BY COMMISSIONER—ASSESSMENT OF THE R. M. P. CHETTYAR FIRM OF GYOBINGAUK, FOR THE YEAR 1927-28.

STATEMENT OF FACTS AND OF OPINION BY COMMISSIONER OF INCOME-TAX, BURMA.

RANGOON : OFFICE OF THE SUPERINTENDENT, GOVERNMENT PRINTING AND STATIONERY, BURMA : OCTOBER 1928.

SUBJECT.—*Income-tax Act, Indian (XI of 1922), Section 66 (2)—Reference to the High Court—Statement of case by Commissioner—Assessment of the R. M. P. Chettyar Firm of Gyobingauk, for the year 1927-28.*

This reference is made to the High Court under the provisions of Section 66 (2) of the Indian Income-tax Act on the application of the R. M. P. Chettyar firm, Gyobingauk, in connection with the firm's assessment for the year 1927-28.

The questions in respect of which a reference is sought by the applicant-firm are reproduced below :—

I. Whether the Income-tax Officer is entitled to assess an assessee under Section 23 (4) of the Act for an alleged default to comply with a notice under Section 22 (4) after the said assessee has made a return and when no default under Section 23 (2) is alleged.

II. Whether in the present case it was open to the Income-tax Officer to make a valid assessment under Section 23 (4) of the Act.

The applicant's legal representative, at the hearing given in connection with the above application, admitted that the two questions are really concerned with the same point. They involve a question of law which may be referred in the following terms :—

"After an assessee has made a return of his income under Section 22 (2), can the assessment be made under Section 23 (4) of the Act for non-compliance with the terms of a notice under Section 22 (4) ?"

2. The facts of the case relevant to this question are as follows :—

For the applicant-firm's assessment for 1927-28, which is the assessment in question, a notice under Section 22 (2) was served on the firm's agent on the 6th July 1927. The agent submitted a return on the 30th July 1927, declaring an income of Rs. 14,330. The Income-tax Officer after receipt of this return issued notices under Sections 22 (4) and 23 (2) for the production of all the accounts of the firm for the year 1926-27 and also for the attendance of the firm's agent or representative. In response to these notices, the agent appeared and produced certain account books. These account books were scrutinized. The result of this scrutiny showed that the books produced were not the complete books maintained in connection with the ordinary business of the firm. The Income-tax Officer therefore held that the applicant-firm failed to comply with the notice under Section 22 (4) and for this default he made the assessment under Section 23 (4) of the Act.

3. The questions reproduced above are raised by the applicant-firm in view of certain pronouncements and conflicting decisions by other High Courts in India.

In the case of *Brij Raj Rang Lal* vs. *Commissioner of Income-tax, Behar and Orissa*, the Patna High Court, in dealing with the construction of Sections 22 (4) and 23 (4) of the Income-tax Act, expressed the view that accounts or documents can be called for by the Income-tax Officer under Section 22 (4) after issue of notice under Section 22 (2) and before the filing of the return, and that after the filing of the return the Income-tax Officer should proceed under Sections 23 (2), 23 (3) and 37 to secure whatever accounts or documents he may require. Proceeding on this construction, the High Court took the view that non-compliance with a notice under Section 22 (4) where such notice is issued after the receipt of the return does not authorise the Income-tax Officer to make a summary assessment to the best of his judgment under clause (4) of Section 23.

A.I.R. (1927), Pat., 390.

The same view was taken by the Lahore High Court in the case of *Messrs. Khushi Ram Karan Chand* vs. *Commissioner of Income-tax, Punjab* (case No. 549 of 1926, decided on 22nd December 1927). But the Allahabad High Court in Miscellaneous Case No. 1027 of 1927 (decided on 4th January 1928) dissented from this view.

The Calcutta High Court, also, on a reference made by the Commissioner of Income-tax, Bengal, under Section 66 (2) of the Income-tax Act (in the matter of *Messrs. Harmukhrai Dulichand*, decided on 26th March 1928) held that the power given to the Income-tax Officer by Section 22 (4) to call for accounts is not impaired by anything in Section 23 (4) and that non-compliance with a notice under Section 22 (4) issued at any time in the course of the assessment constitutes a default necessitating the application of Section 23 (4). Subsequent to this judgment, the *Brij Raj Rang Lal* case was reconsidered by a Bench of the Patna High Court, and the decision, following that of the Calcutta High Court, was that the decision in the *Brij Raj Rang Lal* case, in so far as it was a decision on the construction of Section 22 (4), was wrong (case decided on 12th June 1928).

4. Under the Act, I am required to give my opinion on the question at issue in this case. The relevant portion of Section 22 (4) of the Act is as follows :—

"The Income-tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under sub-section (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require."

The only condition to be fulfilled for the valid employment of this provision is that, except in the case of a company, a previous notice under Section 22 (2) requiring the submission of a return should have issued. No other condition is imposed or contemplated.

The other relevant provision of the Act is Section 23 (4) which enacts :—

"If the principal officer of any company or any other person fails to make a return under sub-section (1) or sub-section (2) of Section 22, as the case may be, or fails to comply with the terms of a notice issued under sub-section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment."

There are three categories of default which make an assessment under this sub-section obligatory :—

(1) Failure to make a return ;
(2) Failure to comply with a notice under Section 22 (4), and
(3) Failure to comply with a notice under Section 23 (2).

These are three distinct categories, and if there is a default under any one of them, the Income-tax Officer must make the assessment under Section 23 (4). The only disturbing element in the acceptance of this view in the cases referred to above was the existence of the words "having made a return" in Section 23 (4). In my opinion, these words have no reference whatever to the power conferred on the Income-tax Officer by Section 22 (4), nor do they have the effect of excluding from the purview of Section 23 (4) a default under the second category after a return is made. They simply indicate that a notice under Section 23 (2), and therefore a default in respect of it, can only eventuate after a return has been filed.

I am of opinion, therefore, that the question referred should be answered in the affirmative.

J. F. SHEEHY,
Commissioner of Income-tax, Burma.

RANGOON, *the 31st October* 1928.

G.B.C.P.O.—No. 3, C.I.T., 29-10-28—50.